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In the

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Ninth Circuit jury rendered an aggregate $120 million verdict against petitioners based entirely on three political communications: two "GUILTY" posters and a website known as "The Nuremberg Files." The communications, which identify abortion doctors and call for lawful protest against them, were punished as "threats" under FACE and Hobbs Act "extortion" under RICO.

On appeal, a three-judge panel (Judges Kozinski, Kleinfeld, and Schwarzer) unanimously vacated the verdict, along with the district court's injunction banning even mere possession of the forbidden literature. The three-judge panel's de novo review of the First Amendment question revealed that the posters and website threaten nothing and are protected political speech.

By a vote of six to five (Judges Reinhardt, O'Scannlain, Kozinski, Kleinfeld, and Berzon dissenting), a limited en banc panel (hereafter "the majority")—conceding that the communications contain no threatening language—reinstated the verdict and injunction, remanding only for reconsideration of the quantum of punitive damages.

The First Amendment questions of law presented are:

1. Were petitioners' communications protected by the First Amendment?

2. Can the public communication of political protest ("GUILTY" posters) that admittedly contains no threatening language be deemed a "threat" solely on the basis of an alleged "pattern" between the *format* of that communication and the format of other publicly communicated political protests ("WANTED" posters) that were followed remotely by isolated crimes against some persons named in the other protests?

3. Can civil liability be predicated on a website that is concededly protected First Amendment speech merely because its list of names is "interpreted" as an "implied threat" when read "in conjunction with" the supposedly threatening format of other communications naming the same people?

4. Did the Ninth Circuit err by upholding a damage award in the context of political expression, where the jury instructions were not limited to the novel theories of "format" and "conjunction with" liability subsequently embraced on appeal?

5. Did the Ninth Circuit err by holding, in conflict with the Second Circuit, that the First Amendment permits punishment of public forum political speech under a mere negligence standard with no showing of any specific threatening statement?

6. Did the Ninth Circuit err by holding, in conflict with other circuits, and with this Court, that First Amendment review of a verdict punishing speech is not de novo in "threat" cases but is, rather, not "dramatically different from determining that the issue should have gone to the jury and that the jury was properly instructed"?

7. Does the First Amendment permit an injunction against publication or possession of political messages or their "equivalent" based on an alleged "threat" in their format?

PARTIES TO THE PROCEEDING

Petitioners are American Coalition of Life Activists (ACLA), Advocates for Life Ministries (AFLM), Michael Bray, Andrew Burnett, David A. Crane, Michael B. Dodds, Timothy Paul Dreste, Joseph L. Foreman, Charles Roy McMillan, Bruce Evan Murch, Catherine Ramey, Dawn Marie Stover, Donald Treshman, and Charles Wysong.

Respondents are Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; and James Newhall, M.D.

RULE 29.6 STATEMENT

Petitioners state that they have no parent companies or non-wholly owned subsidiaries and that there are no publicly held companies that hold stock of the petitioners.

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OPINIONS BELOW

The opinion of the en banc panel, App. 1a, appears at 290 F.3d 1058. The opinion of the three-judge panel, App. 111a, appears at 244 F.3d 1007. The district court's injunction, App. 132a, appears at 41 F. Supp. 2d 1130. The district court's order on summary judgment, App. 185a, appears at 23 F. Supp. 2d 1182.

JURISDICTION

The opinion of the en banc panel was issued on May 16, 2002. A timely petition for rehearing was denied on July 10, 2002. App. 218a, 220a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides in relevant part: "Congress shall make no law...abridging the freedom of speech, or of the press...." U.S. Const. amend. I. See Appendix for the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248, App. 242a, the Hobbs Act, 18 U.S.C. § 1951, App. 246a, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962, 1964, App. 247a-248a.

STATEMENT OF THE CASE

This case raises First Amendment questions of national importance, provoking law review commentaries and extensive media coverage. The core constitutional facts are undisputed.

Petitioners are twelve pro-life advocates and two pro-life organizations. Respondents are four abortion doctors and two abortion clinics. Respondents sued petitioners for an alleged nationwide "conspiracy" to engage in "threats" and

"extortion" in violation of RICO and FACE. Class action allegations and State law claims were dropped.[1] App. 126a n.3.

After years of discovery, respondents' "threat" claim was reduced to two posters and a non-party's website. Petitioner ACLA, an unincorporated association of which some petitioners were "directors," had published the two posters. (All petitioners will be referred to collectively as ACLA.) The website, dubbed "The Nuremberg Files," was created and published, and is operated and maintained to this day, by non-party Neal Horsley, whom respondents never sued. ACLA's name appeared on the website for a few weeks in early 1997, until Horsley removed it at ACLA's request. Tr. 1362-65, 2252-57, 2285-87.

A. The "Deadly Dozen" Poster

At a January 1995 meeting to mark the anniversary of *Roe v. Wade*, ACLA held a press conference near Washington, D.C. and introduced a protest poster listing the names and addresses of the "Deadly Dozen," a group of abortion doctors. L. 2.[2] In large print, the poster declared them "GUILTY of crimes against humanity," contended that Nazis were tried at Nuremberg for abortion crimes, and offered $5,000 for information leading to the "arrest, conviction and revocation of license to practice medicine." *Id.*

B. The "Crist Poster"

In the summer of 1995, ACLA introduced a half-dozen posters during a rally on the steps of the old federal courthouse in St. Louis, where the *Dred Scott* decision was handed down. L. 5, 71-75. The location was chosen to draw a parallel between "blacks being declared property and unborn children being denied their right to live." App. 58a. One of these posters featured respondent Robert Crist, declaring him "GUILTY of crimes against humanity" and botched abortions

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[1] The district court had jurisdiction under 28 U.S.C. §§ 1331, 1367 and 18 U.S.C. § 1964.

[2] Petitioners have "lodged" with the Court selected trial exhibits in 8-1/2 x 11 format, cited herein as "L. [page number]." Reducing the size of the exhibits to include in the Appendix would render them illegible.

causing death or serious injury to women. L.5. The poster included his home and work addresses, his photograph, and offered $500 to "any ACLA organization that successfully persuades Crist to turn from his child killing" through such activities as writing, picketing, and leafleting. *Id.*

C. The "Nuremberg Files"

In January 1996, at its next *Roe* anniversary event, ACLA advocated compiling "Nuremberg Files" on abortion doctors for future Nuremberg-type trials, once the tide of American opinion had turned against abortion. L. 34.

Non-party Neal Horsley, who has a journalism degree from the University of Georgia, was taken by this concept. Tr. 2232, 2236-44. In January 1997, Horsley launched his "Nuremberg Files" website, incorporating a sample "Nuremberg File" on Dr. Prohaska (a non-party) provided by Paul de Parrie, a non-party journalist with petitioner AFLM's now-defunct magazine, *Life Advocate.* L. 34-52; App. 11a. Although Horsley introduced "The Nuremberg Files" as ACLA's project, within a few weeks (and long before trial) Horsley removed ACLA's name after petitioner David Crane had so requested because Crane found other aspects of Horsley's Internet domain objectionable and he did not wish ACLA to be associated with it. Tr. 1362-65, 2251-59, 2285-87. Later iterations of the website no longer associate it with ACLA. *E.g.*, L. 15-31. The website has always been owned, operated, written, formatted, and updated solely by Horsley, who still maintains it online at http://www.christiangallery.com/atrocity/. Tr. 2236-52.

The website lists hundreds of abortion doctors (without addresses), politicians, judges, and celebrities, who are condemned for performing or supporting abortion. The website calls for Nuremberg-type trials of these people in "PERFECTLY LEGAL COURTS once the tide of this nation's opinion turns against the wanton slaughter of God's children." L. 15. Using a "casualty list" published by a mainstream online news source, Horsley added to his list of abortion doctors "strikeouts" for those who had been killed and "gray-outs" for those who had been injured. L. 19-21; Tr. 2282-85. Horsley did this *without* ACLA's knowledge or approval and after ACLA's

name had been removed from the website—as respondents' own trial exhibits show. *Compare* L. 15 *with* L. 34; Tr. 2253, 2258-60, 2286, 2306, 2314.

In denying summary judgment and allowing this case to go to trial, even the district judge was constrained to observe that "[T]here are *no* 'quotable quotes' calling for violence against the targeted providers.... I tend to agree with the defendants and the [amicus curiae] ACLU that the statements at issue do not contain *any* expressly or *apparently* threatening language." App. 190a, 206a.[3] Still, the judge allowed a trial on the theory that the two posters and website were actionable threats "in light of their entire factual context, including the surrounding events and the reaction of the listeners," such that "a reasonable person would foresee that the statement[s] would be interpreted...as a serious expression of intent to harm or assault." App. 197a, 204a-207a, 251a.

Thus, the district judge concluded that facially non-threatening public statements of a political message could be jury-tried under a forseeablity or negligence standard—both as Hobbs Act "extortion" under RICO and "intimidation" under FACE. The trial was little more than 3,000 transcript pages of "context" evidence, admitted despite defense motions *in limine*, written and oral objections, and motions for mistrial. This "context" consisted principally of the following elements:

- Over 600 cumulative references to the same few isolated acts of violence against doctors and clinic-staffers, committed by non-parties who had no legal relation to petitioners.
- The expression by *some* defendants of the protected opinion that use of force to prevent abortion can be morally justified. App. 41a, 85a-86a.
- A merely temporal sequence between the past publication of "WANTED-style" posters by non-parties and subsequent non-party acts of violence—*months*

[3] All emphasis is added unless otherwise noted.

later—against some persons named in these earlier posters. Tr. 161.

- The testimony of an F.B.I agent and two United States Marshals that they and their "headquarters" viewed the posters as "threats." App. 87a-93a.

- Respondents' testimony that, upon advice of law enforcement, they donned bulletproof vests and took other "security" measures, although no violence ever occurred to anyone named in ACLA's posters. App. 41a, 88a-90a, 130a n.16.

The jury was instructed that respondents' claims *were limited* to the two posters and website. *See* App. 207a-208a, 252a-253a, 257a. The jury was further instructed that ACLA could be held liable for threats "even if you believe that the defendants *did not intend the statements to be threatening*," so long as it was foreseeable that the posters and website would be "interpreted" as threats in their supposed "context." App. 251a.

After hearing nearly three weeks of inflammatory "context" evidence, the jury returned an aggregate verdict of $120 million. App. 46a n.4. The district court, declaring ACLA's posters blatantly illegal, enjoined petitioners from publishing, republishing, or even possessing the posters, the website content, or their undefined "equivalent" under pain of arrest and prosecution.[4] App. 181a-184a; *Planned Parenthood v. ACLA*, No. CIV-95-1671-JO, 1999 WL 65450 at *4 (D. Or. Feb. 25, 1999).

D. A Three-Judge Panel Vacates the Verdict and Injunction

A unanimous three-judge panel (Judges Kozinski, Kleinfeld, and Schwarzer) found that the two posters and the website were protected public forum political speech, vacated the verdict and the injunction, and directed entry of judgment for petitioners. App. 124a-125a, 131a n.18.

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[4] Horsley's operation of the website was not enjoined, since Horsley had never been sued. *See* App. 181a-184a. Defense counsel may possess one copy of the documents without incurring liability. App. 183a.

Deciding the First Amendment question de novo, the panel read the posters and website and readily concluded that this is a threat case without a threat:

> [N]one of the statements ACLA is accused of making mention violence at all. While pungent, even highly offensive, ACLA's statements carefully avoid threatening the doctors with harm.... [W]hile ACLA named its targets, it said nothing about planning to harm them; indeed, it did not even call on others to do so.

App. 122a, 125a. The panel cited this Court's key First Amendment decisions concerning the high degree of constitutional protection afforded public forum political speech, especially this Court's unanimous decision in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), which the panel cited as controlling. App. 118a-120a, 124a-125a.

The three-judge panel rejected the district court's theory that a "context," consisting of past violence by non-parties, could convert otherwise non-threatening speech into threats:

> If this were a permissible inference, it could have a highly chilling effect on public debate on any cause where somebody, somewhere has committed a violent act in connection with that cause. A party who does not intend to threaten harm, nor say anything at all suggesting violence, would risk liability by speaking out in the midst of a highly charged environment.... Nor may we saddle political speakers with implications their words do not literally convey but are later "discovered" by judges and juries with the benefit of hindsight and by reference to facts over which the speaker has no control.

App. 123a-124a. The panel also rejected the theory that a "threat" could be found merely because the posters and website had made respondents apprehensive that such public exposure could make them more susceptible to violence:

> Were the instruction taken literally, the jury could have concluded that ACLA's statements contained "a serious expression of intent to harm," not because they authorized or directly threatened violence, but because they put the doctors in harm's way. However, the First

> Amendment does not permit the imposition of liability on that basis.

App. 121a; *see also* App. 120a-121a (panel citing respondent Elizabeth Newhall's trial testimony that for her the "threat" was being publicly "identified as a target" to potential assailants. Respondents conceded that ACLA's statements incited no violence. App. 70a n.5, 130a n.16).

E. An En Banc Majority Reinstates the Verdict and Injunction

After the three-judge panel's decision, the Ninth Circuit granted limited en banc review. By a narrow vote of six to five, the en banc court reinstated the verdict and injunction, vacating only to the extent of remanding for reconsideration of the quantum of punitive damages. App. 8a, 42a.

The majority, devising a special standard of First Amendment review in "threats" cases, did not decide de novo whether ACLA's statements were protected, as had the three-judge panel. Rather, the majority concluded that its First Amendment review "does not seem dramatically different from determining that the issue should have gone to the jury and that the jury was properly instructed under FACE." App. 39a. The majority also refused to consider the public, political nature of ACLA's statements in determining whether they were "threats" versus protected advocacy. App. 28a.

F. The En Banc Majority's Theory of "Format" Liability

Like the three-judge panel, the majority noted that the posters "contain *no* language that is a threat," App. 22a, and conceded that the "ideological *content*" of the posters is protected. App. 43a.

The majority reinstated the verdict and injunction solely on the basis of a theory it dubbed "the poster pattern." App. 39a-42a. The majority opined that ACLA's "wanted-*type*" posters could be viewed as threats under FACE (and thus RICO) because their "wanted-type *format*" (not their content) supposedly resembled the "'wanted'-type format" of earlier posters naming abortion doctors Gunn, Patterson, and Britton, which were published by non-parties weeks and

months before these doctors were killed, also by non-parties.[5] Thus, says the majority: "Neither the Crist poster nor the Deadly Dozen poster contains *any* language that is overtly threatening.... [T]he *language itself is not what is threatening*. Rather, it is the use of the "wanted"-type *format* in the context of the poster pattern—poster followed by murder—that constitutes the threat." App. 39a.

The majority opined that the "wanted-type" format might have remained a "purely political message" after Gunn and Patterson were killed, but after Britton's death the format "acquired currency as a death threat." App. 32a, 55a. Thus, the "wanted-type format" was supposedly transmuted into a per se threat after *three*, but not *two*, unrelated deaths. Respondents' counsel, however, conceded that no evidence exists that Patterson's death related to anti-abortion activity. App. 55a; Tr. 131. Patterson was reportedly killed in a *robbery attempt*, and the case was never solved. App. 55a; Tr. 1197. Further, trial witnesses testified without contradiction that *hundreds of posters* condemning abortion doctors have circulated for years without violence against any of the doctors named. App. 55a. The majority's "poster pattern" therefore consists of *two*—not three—known acts of anti-abortion violence against doctors who had been named in posters, out of *hundreds of such posters* circulating throughout the nation. If any "poster pattern" exists here, it is poster = no violence. *Id.*

G. The Forbidden "Format" is Not Defined

The majority never defined "wanted-type format" and never distinguished "wanted-type" posters from other posters condemning doctors. ACLA's posters do not even contain the word "WANTED," and their text differs completely from the posters of Gunn, Patterson, and Britton. L. 2, 5, 54, 56, 58, 60, 62, 65, 67, 69. ACLA's "Deadly Dozen" poster not only does not say "WANTED," it lists *thirteen* names (not one) and contains no picture (as do the other posters). L. 2. With regard to what it meant by "wanted-type format," the majority

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[5] The majority limited its entire discussion to FACE, presuming that its legal conclusions would be equally applicable to the racketeering claim for Hobbs Act "extortion" under RICO. App. 45a n.1.

merely stated that "differences in caption or words are immaterial...." App. 39a.

H. News Articles Treated as RICO and FACE Violations

One of respondents' trial exhibits was an article in the now-defunct *Life Advocate* magazine, published by the now-defunct AFLM. L. 11-12. The article presents the "Deadly Dozen" poster's list of names and addresses, along with editorial comment defending the poster, but *none* of the poster's text or layout. L. 12. Another such trial exhibit was an article by petitioner Bruce Murch in his newsletter *Salt and Light*, wherein he provides a thumbnail facsimile of the "Deadly Dozen" poster, explains why it is no "threat," and lampoons the political opposition's reaction to the poster. L. 7-9. At trial, respondents were allowed to claim that both articles were a "republication" of the "threat" for purposes of proving RICO predicate acts and multiple FACE violations. Tr. 144-45, 962-63, 1069, 1360. The majority agreed.

I. The En Banc Majority's Theory of "Conjunction" Liability

The majority concluded that "the Nuremberg Files are protected speech," with a qualified exception for Horsley's list of doctors marked with "strikeouts" and "gray-outs." App. 32a-33a, 45a. The majority concluded that the list is a jury-triable "threat," but *only when combined with ACLA's posters*:

> [W]e cannot say that it is clear as a matter of law that listing Crist, Hern, and the Newhalls on *both* the Nuremberg Files *and* the GUILTY posters is purely protected, political expression.... *In conjunction with* the "guilty" posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on the hit list. *To this extent only*, the Files are also a true threat. However, the Nuremberg Files are protected speech.

App. 33a, 45a (first two emphases original).

J. The Jury Was Not Confined By The New Liability Theory

Although the majority would now limit liability for ACLA's speech to the "wanted-type format" of the posters and the list of doctors on the website when read "in conjunction with" the posters, the jury instructions imposed no such limitations. The jurors were free to view the *words* of the three communications as "threats," and respondents testified that the words, not just the format, were "threatening." *See, e.g.*, Tr. 631-35; App. 249a, 251a-253a. Respondents' counsel urged the jury to punish ACLA for its "threatening *words*, made [sic] by persons who want these doctors *to listen to them, to agree with their view* on the abortion question or else." Tr. 109.

The verdict form gives no indication which aspects of the posters (or magazine articles) were punished—words alone, format alone, or words and format combined—nor which aspects of the website the jury deemed a "threat." App. 249a. Also, the injunction punishes the whole of the communications without any distinction between "format" and content. App. 181a-184a.

K. The Dissenting Opinions

In an opinion written by Judge Kozinski, the five dissenters warned that the majority had departed from this Court's First Amendment principles as recapitulated in *Claiborne*, wrongly deferred to a jury's punishment of public forum political speech, and chilled the First Amendment liberty of protesters everywhere:

> The lesson of what a local jury has done to defendants here will not be lost on others who would engage in heated political rhetoric in a wide variety of causes.... In this case, defendants *said nothing remotely threatening*, yet they find themselves crucified financially. Who knows what other neutral statements a jury might imbue with a menacing meaning based on the activities of unrelated parties. In such circumstances, it is especially important for an appellate court *to perform its constitutional function* of reviewing the record to ensure

> that the speech in question clearly falls into one of the narrow categories that is unprotected by the First Amendment. *The majority fails to do this.*

App. 68a-69a.[6]

L. The Ninth Circuit's Mandate Is Stayed

A timely motion for rehearing was denied on July 10, 2002, with Judges Kozinski and O'Scannlain voting to rehear. App. 218a, 220a. On July 24, 2002, the Ninth Circuit stayed the issuance of its mandate pending the outcome of this petition.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held that two provocative posters and a controversial website are punishable by a massive damage award under RICO and FACE, and by a FACE injunction forbidding even the possession of forbidden political messages. This case, therefore, tests the core of the First Amendment: constitutional protection for "insulting, and even outrageous, speech," *Madsen v. Women's Health Center*, 512 U.S. 753, 774 (1994), speech that has "profound unsettling effects," *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), and speech that may be "gross and repugnant in the eyes of most," *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

The enormous damage award and prior restraint do not rest on any claim of defamation, incitement, intentional infliction of emotional distress, or fighting words. Moreover, the majority conceded that the posters and website contain no threatening language. App. 7a, 32a-33a, 39a, 44a. Respondents' judgment rests solely on the theory—enunciated for the first time on appeal—that ACLA's posters

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[6] Judge Reinhardt (with Judges Kozinski, Kleinfeld, and Berzon) also dissented, noting the majority wrongly rejected "the concept that speech made in a political forum on issues of public concern warrants heightened scrutiny." App. 52a-53a. Judge Berzon (with Judges Reinhardt, Kozinski, Kleinfeld, and, in part, O'Scannlain) also dissented, stating that this Court's precedents (*see* Point II, *infra*) require a specific intent standard and a clearly threatening statement for threat claims arising from public, political speech. App. 79a-87a.

were "threats," not because of their content, but because of their *format*. This notion, embraced by a bare majority of the limited en banc panel, is flatly inconsistent with the First Amendment.

Aside from a blatant misapplication of RICO to pure political speech, the Ninth Circuit has ignored FACE's own built-in rule of construction that FACE shall not be construed to prohibit First Amendment *expressive conduct* or *create new remedies* to interfere with First Amendment activities. 18 U.S.C. § 248 (d)(1)-(2); App. 244a. Here, FACE was used to punish *admittedly protected* political content, based solely on an ill-defined forbidden "format."

I. The En Banc Majority Criminalized Public Forum Political Speech

The label "threat" cannot obscure the true nature of this case: This case concerns freedom of speech in America. As Judge Berzon observed in her dissent, "[T]he speech for which the defendants are being held liable in damages and are enjoined from reiterating in the future is, on its face, clearly, indubitably, and quintessentially the kind of communication that is fully protected by the First Amendment." App. 75a. And, as Judge Kozinski noted in his dissent, the majority's opinion "is contrary to the principles of the First Amendment as explicated by the Supreme Court in *Claiborne Hardware* and its long-standing jurisprudence stemming from *Brandenburg v. Ohio*...." App. 69a.

A. The En Banc Majority's Novel Notion of Actionable Threats

The majority conceded what is undeniable: that ACLA's statements incited no violence, contain no threatening language, and express only protected opinions. App. 7a, 21a-23a, 32a-33a, 39a-40a, 43a-44a. Under all known constitutional standards, ACLA's speech was protected. (*See* Part I.B, *infra*.)

To contrive a basis for liability, the majority adopted the theory that the *format* of otherwise protected speech can become a "threat" merely because of a "pattern" of isolated acts of violence against some persons named in speech with a

"similar" format. App. 32a-33a, 39a-45a. The majority discerned a prohibited "poster pattern" in the mere coincidence that on three occasions—only two known to be related to anti-abortion activity—non-parties committed violence against abortion doctors named in "wanted-type format" posters, weeks and months after other non-parties had published them, when *hundreds of posters* of abortion doctors had circulated without violence. *Id.* & 55a. The majority declared that "[t]he true threats analysis *turns on* the poster pattern." App. 39a. Thus, petitioners were punished solely for "replicating the poster pattern." App. 41a-42a. Before discussing the constitutional infirmities of this theory, three things must be noted:

First, the theory is premised on the *post hoc ergo propter hoc* fallacy, which the majority expressly embraced in referring to "the *format* that had previously *resulted* in the death of three doctors...." App. 41a. The notion that the format of posters "resulted" in death should not require serious First Amendment discussion. One might as well speak of picket signs, demonstrations, or even sunrises resulting in death, since these were also seen before the three deaths occurred. Indeed, under the majority's reasoning, ACLA's posters *prevented* violence and *broke* the "poster pattern" because no subsequent violence occurred to doctors named in ACLA's posters. App. 55a, 71a n.9, 85a, 130a n.16.

Second, as the five dissenters note, the majority "utterly fails to apply its own definition of a threat...." App. 53a. Although ACLA's statements are not "threats" under *any* known definition (this is not a case of statutory construction but a free speech case) the majority decided that a "threat of force" under FACE (and the Hobbs Act) is any "*statement* which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted...as a serious expression of intent *to inflict* bodily harm upon that person." App. 28a, 53a. Aside from the unconstitutionality of a mere negligence standard for criminalizing political speech (*see* Point II, *infra*) the majority never demonstrated how a "poster pattern" arising from other people's posters and violent acts could amount to a *statement* by ACLA that it would *inflict* bodily harm on respondents.

Third, under the "poster pattern" theory, "it is use of the 'wanted'-type *format*...that constitutes the threat," *not* the content of the posters. App. 39a. Thus, ACLA's political message would have been fully protected had it been conveyed orally in a public speech, but once printed on a rectangular sheet of paper it became a forbidden "wanted-style" poster. This is First Amendment nonsense. The majority's notion of an unprotected "threat" cannot bear the least scrutiny under this Court's precedents.[7]

B. Conflict With This Court's Decisions

1. *Unconstitutional Vagueness*

The majority never defined "wanted-type format," except to remark mysteriously that "differences in caption or words are immaterial." App. 39a. The majority deemed ACLA's posters "wanted-type" even though they do not say "WANTED" and their text differs completely from the earlier posters. Clearly, "wanted-type format" eludes precise definition. It is the essence of a standardless speech restriction, allowing courts and political opponents unfettered discretion to interpret it as they see fit. *See, e.g.*, *Lakewood v. Plain Dealer Pub.Co.*, 486 U.S. 750, 757 (1988).

And what of the Nuremberg Files website, which is not a poster? Stacking one untenable theory upon another, the majority deemed the list of doctors on the website a jury-triable threat when read "in conjunction with" the "format" of ACLA's posters. App. 32a-33a, 39a-42a, 44a-45a. Thus, an otherwise protected website was converted into racketeering by linking it to posters with an undefined "wanted-type format." The majority even swept into the "poster pattern" ACLA's editorials defending the "Deadly Dozen" poster,

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[7] The majority asserted that ACLA's posters were a "symbol" of violence, like the Ryder trucks parked in entrances to abortion clinics in *United States v. Hart*, 212 F.3d 1067 (8th Cir. 2000). App. 30a-31a. People feared the trucks because they thought the trucks *were actual bombs* like the Ryder truck that blew up the Oklahoma City federal building, not because they were symbolic of a bomb. It was even stipulated that Hart wanted people to think the trucks were filled with explosives. *Id.* at 1069-70. There is no history of exploding posters. And, unlike ACLA's posters, the Ryder trucks conveyed *no political message*; their use was pure conduct, like lobbing a dummy grenade into a crowd.

which the jury was told were "republications" of the "threat." App. 11a; Tr. 59, 144-45, 962-63, 1069, 1360.

In effect, the majority defined "threat" as *anything* ACLA published against named respondents to "identify" and "intimidate" them. Here one sees the hidden theory of this case: identification = intimidation = threat. This theory criminalized ACLA's speech simply because it *identified* individual doctors. That is precisely why the majority sustained an injunction prohibiting petitioners' publication of "personally *identifying* information" about respondents—*whether or not it is contained in a poster.* App. 44a-45a, 182a-183a. But speech cannot be punished merely because it identifies political opponents under circumstances where violence might occur in the indeterminate future. (*See* Part I. B.4, *infra.*)

2. *Rejection Of The Public-Private Distinction*

Evading this Court's precedent on public forum political speech, the majority simply opines that "*[t]hreats*, in whatever forum, may be independently proscribed...." App. 48a n.11 (original emphasis). But that opinion begs the question; as this Court has made clear, the public and political nature of speech is a crucial factor in deciding whether it *is* a threat in the first place.

This Court has repeatedly admonished that public speech on matters of public interest stands at the core of First Amendment liberty and merits the highest possible protection—alleged "threats" included. Thus, in *Watts v. United States*, 394 U.S. 705, 707-08 (1969), which involved a conviction for threats under the Presidential threat statute, this Court observed that "What is a threat must be distinguished from what is constitutionally protected speech.... [D]ebate on *public issues* should be uninhibited, robust, and wide-open, and...may well include vehement, caustic, and sometimes unpleasantly sharp attacks...." *See also Claiborne*, 458 U.S. at 913 ("expression on *public issues* 'has always rested on *the highest rung* of...First Amendment values.'"). The majority's refusal to consider the public nature of ACLA's speech, merely because it was labeled a "threat," is grounds for reversal.

3. *Rejection Of The Brandenburg Standard*

Rather than show how the "poster pattern" could amount to a statement by ACLA of an intention *to inflict* bodily harm, the majority concluded that "[K]nowing the fear generated among [doctors]...who were singled out for identification on a 'wanted'-type poster, ACLA deliberately *identified* [plaintiffs]...to intimidate them." App. 32a. But speech is not a threat merely because it "generates" fear. (*See* Part I. B.4, *infra*.) Under this theory, it does not matter that ACLA never stated it would *inflict* violence, never called for violence, and spoke only of peaceful protest; all that matters is that ACLA's statements *were posters* that "generate fear" of violence—someday, somehow, by somebody. To recall the testimony of respondent Newhall, cited by the dissenters, the "threat" consisted of being publicly "identified as a target" to potential assailants. App. 56a.

This is nothing but a highly attenuated incitement claim. Even if the "poster pattern" existed—and it does not—this "pattern" could not restrict speech. The only actionable "pattern" involving speech is a statement that is "*directed* to inciting or producing *imminent* lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). But, ACLA's posters incited no violence. App. 130a n.16. The majority's theory implicitly rejects *Brandenburg*.[8]

4. *Rejection Of Claiborne Hardware And Its Antecedents*

Rather than follow this Court's precedents, the majority cast this case as one of statutory interpretation of FACE's term "threat of force." App. 6a. But, this Court has

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[8] In Oregon, where this case was tried, AFLM's pretrial distribution of condemnatory posters with photographs and addresses of Portland-area doctors—*after* the "poster pattern" supposedly emerged—was found *not to be a threat* for purposes of Oregon's anti-stalking law. *Hanzo v. deParrie*, 953 P.2d 1130 (Or. Ct. App. 1998). The court, like the petitioners, was unaware that a "poster pattern" had converted posters of abortion doctors into federal racketeering. Even if petitioners were aware of a "poster pattern," under *Brandenburg* that awareness would not have made ACLA's posters illegal.

repeatedly corrected the abuse of statutes to punish unpopular speakers, even when alleged threats were involved.

In *Watts*, this Court summarily reversed the *threat* conviction of a Vietnam war protester who had shouted to a crowd: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706. This Court concluded that "We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term [threat]." *Id.* at 708. Several weeks later, in *Brandenburg*, 395 U.S. at 445, this Court summarily reversed the criminal conviction of a Ku Klux Klan leader for advocating violence against blacks, the President, the Congress, and the Supreme Court. Then, in *Hess v. Indiana*, 414 U.S. 105, 107 (1973), this Court summarily reversed the disorderly conduct conviction of an anti-war protester who had tried to rally a crowd to violence by shouting "We'll take the fucking street later [or again]"—after the police had just cleared the street.

That all three of these key First Amendment decisions involved *per curiam* opinions summarily reversing criminal convictions of speakers who at least *said* something that apparently threatened (or aimed to provoke) violence, should have indicated to the majority the correct result here, where ACLA said absolutely *nothing* about violence. But this Court has offered an even more explicit indication of the correct result in this case. In *Claiborne*, this Court summed up its entire jurisprudence on the First Amendment protection of even the most aggressive and intimidating public forum rhetoric. The facts of *Claiborne* are so closely analogous to this case that the three-judge panel and the five dissenters rightly cited it as controlling. App. 57a-69a, 118a-121a, 124a-125a.

The *Claiborne* Court unanimously reversed a state court damage award and injunction against the NAACP, its representative, Charles Evers, and others, arising from their boycott of white-owned businesses in a small Mississippi town. This Court did so even though Evers made clearly threatening statements to coerce compliance with the boycott:

- the boycott organizers knew the identity of those in the black community who violated the boycott, 458 U.S. at 900 n. 28;

- boycott violators would be *disciplined*, *id.* at 902, 927;

- "[i]f *we* catch any of you going in any of them racist stores, *we're* gonna break your damn neck," *id.* at 902; *see also id.* at 900 n.28;

- "the Sheriff could not sleep with boycott violators at night" to protect them from reprisal for violating the boycott, *id.* at 902;

- "blacks who traded with white merchants would be *answerable to him*," *id.* at 900 n.28.

In the context of these speeches, violent acts—including shots fired at individuals' homes—were committed against boycott violators. *Id.* at 904-06. Moreover, Evers's apparent threats were directed to *individual members* of the community when store watchers known as "Black Hats" or "Deacons" *identified* those who traded with the merchants, noted the names of violators, and *published them* in a local black newspaper. *Id.* at 903-04 & n.34, 909. In view of these facts, this Court recognized that Evers's statements "might have been understood as inviting an unlawful form of discipline or, at least, *as intending to create a fear of violence* whether or not improper discipline was specifically intended." *Id.* at 927. Still, this Court found that Evers's statements were protected. As the five dissenters here note:

> The Court concluded that the statements in question were not "fighting words"...nor were they likely to cause an immediate panic.... Nor was the speech in question an incitement...because it resulted in no immediate harm to anyone. The Court also cited, and found inapplicable, its one case [*Watts*] that had held "true threats" were not constitutionally protected. The mere fact that the statements could be understood "as intending to create a fear of violence," was insufficient to make them "true threats" under *Watts*.

App. 61a.

Evers's statements were not actionable even though they could be seen "as intending to create a fear of violence." *Claiborne*, 458 U.S. at 927. Yet, speech that merely "create[d] a fear of violence" is precisely what the majority viewed as a "threat" under its "poster pattern" theory, which converts political posters into threats merely because their *format* "generated" fear. App. 32a-33a, 39a-42a, 44a-45a. ACLA's use of posters might have intimidated respondents, but merely intimidating speech is protected: "Speech does not lose its protected character...simply because it may embarrass others or *coerce* them into action." 458 U.S. at 910. FACE itself prohibits only intimidation by "threat of force," 18 U.S.C. § 248(a)(1), not mere intimidation. The majority obliterated this distinction, finding that the *state* of intimidation—feeling threatened by ACLA's posters—was equivalent to a threat. But ACLA made no threat of force. And, unlike Evers, ACLA did not mention violence. The three-judge panel noted the inescapable conclusion: "If Charles Evers's speech was protected by the First Amendment, then ACLA's speech is also protected." App. 124a.

The five dissenters noted that the majority's effort to distinguish *Claiborne* "does not bear scrutiny." App. 63a. The majority stated that *Claiborne* did not involve "a threats *statute*," App. 24a, but the case certainly *did* involve threats. In a supplemental brief on the grounds for state court liability, the *Claiborne* respondents conceded that "'[the] basis on which the Mississippi Supreme Court held that petitioners were liable for damages was 'the agreed use of illegal *force*, violence and *threats*....'" 458 U.S. at 896 n.19. The majority's "distinction" that during the *Claiborne* boycott "[n]o specific individuals were targeted," App. 25a, ignores the fact that boycott violators were *identified* and their names *published* in conjunction with Evers's threats of broken necks and other discipline. 458 U.S. at 900-04.

Finally, as *Claiborne* teaches, the First Amendment bars "guilt by association" with a group, *id.* at 919, unless "the group itself possessed unlawful goals and...the individual held a *specific intent* to further those illegal aims." *Id.* at 920. Here, the majority punished ACLA's speech based on a "pattern" between earlier posters and isolated violence by

non-parties with whom ACLA *was not legally associated.* This imposition of "guilt by context" is even more pernicious than guilt by association.

5. *Conflict With Ashcroft v. Free Speech Coalition*

The five dissenters note that the majority failed to follow *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002). App. 64a-65a. In *Ashcroft*, this Court held that the criminalization of "virtual child pornography" (computer-generated images) was unconstitutional, despite the government's claim that such images encourage sex-crimes. *Id.* at 1397-1406. This Court noted that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it" and that there was "no more than a remote connection" between the speech and unlawful acts. *Id.* at 1403. Here, there was *not even a remote connection* between ACLA's posters and violence. The "poster pattern" is even less constitutionally sustainable than "the virtual child-porn pattern."

C. National Consequences Of The Ninth Circuit's Decision

The five dissenters properly warn that the majority's decision "will haunt dissidents of all political stripes for many years to come." App. 69a, 102a-103a. The majority's unconstitutional notion of "threat" and its refusal to follow *Claiborne* will be cited as precedent in other lawsuits brought to smash political opponents under the twin hammers of RICO and FACE. That enterprise has already succeeded here, but worse will surely come.

For starters, because the majority did not define "wanted-style poster" beyond remarking that "differences in caption or words are immaterial," App. 39a, the majority effectively banned all posters naming the targets of anti-abortion protest. What pro-life activist would now risk guessing what constitutes a "wanted-style" poster, especially since the majority says the word "WANTED" is not necessary? The majority has converted all posters condemning named doctors into potential RICO and FACE violations with no

effective statute of limitation, since the "threat" arises from a poster's existence, according to the injunction upheld here.

More alarming than the majority's *de facto* criminalization of an entire genre of classic political speech, is the prospect that the "logic" behind the "poster pattern" theory will be applied to create actionable "patterns" between all manner of political expression and subsequent violence. Today it is the "poster pattern." Tomorrow it could be the "chanting pattern," "picketing pattern," or "editorial pattern." Indeed, in this case, *editorials defending a poster* were presented to the jury as RICO predicate acts. L. 7-12. The majority's opinion, if allowed to stand, will unquestionably be used as precedent to silence other forms of political expression. To recall Judge Kozinski's warning, "Who knows what other neutral statements a jury might imbue with a menacing meaning based on the activities of unrelated parties." App. 68a.

II. The En Banc Majority Punished Political Speech Under A Negligence Standard, In Conflict With This Court And The Second Circuit

As Judge Kozinski noted in his dissent, the majority failed even to apply its own definition of a threat, App. 53a, resorting instead to the ad hoc theory that the *format* of ACLA's posters was a "threat" because the *format* "generated" fear, even if the content was protected. Although ACLA's speech was simply not a threat, nevertheless the First Amendment requires a far more stringent definition of "threat" than the one the majority adopted, "for the first time," App. 6a, under FACE.

A. This Court's Decisions Preclude A Mere Negligence Standard For Threat Claims Against Political Speakers

The majority held that petitioners could be punished with a massive damage award and a strict injunction based not on what petitioners actually said in their posters, but rather for "replicating a poster pattern" that "in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted...as a serious expression of intent to inflict bodily harm...." App. 28a, 53a. The majority saw no First Amendment problem with a jury instruction that

allowed the jury to find Hobbs Act extortion and FACE violations "even if you believe that the defendants *did not intend the statements to be threatening*," so long as it was *foreseeable* the posters would be "interpreted" as threats. App. 251a. Such a hair-trigger standard is deadly to First Amendment liberty in the heat of America's culture wars.

Running throughout the *Watts-Brandenburg-Hess* line of cases, culminating in the unanimity of *Claiborne*, is an implicit recognition that public-interest speech, even if labeled a "threat," cannot be punished unless the speaker's statement was "directed," that is, *specifically intended*, to cause or threaten imminent violence. As *Claiborne* teaches, members of a group cannot be liable for the group's allegedly illegal aims without "*specific intent* to further those illegal aims." 458 U.S. at 920. This teaching obviously includes the alleged illegal aim of making threats.

In his concurring opinion in *Rogers v. United States*, 422 U.S. 35 (1975), Justice Marshall, joined by Justice Douglas, stated that, rather than bypass the merits and reverse on other grounds, he would have addressed the merits and reversed because he disagreed with the "objective" construction given the federal presidential threats statute. *Id.* at 42-43, 47-48. Justice Marshall explained that the "objective interpretation [of the statute] embodies a negligence standard," *id.* at 47, under which a speaker could be held liable without intending to make a threat. Justice Marshall warned that "[W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech." *Id.* Justice Marshall would have read the statute to "require proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out." *Id.* at 48. A lesser reading would "continue to do mischief in future prosecutions" under the statute. *Id.* This case presents this Court with the opportunity to clarify that the First Amendment requires more than a mere negligence standard for threat claims against political speakers.

B. The Ninth Circuit's Inconsistent Approach To The Threats Standard

The majority's construction of "threat of force" under FACE is radically self-contradictory. As to the crushing liability verdict, the majority deemed a negligence standard sufficient for First Amendment protection.[9] But the majority upheld the facially unconstitutional injunction as "finely tuned and exceedingly narrow" because "[*o*]*nly* threats or use of the posters or their equivalent with the *specific intent to threaten*...are prohibited." App. 44a. The majority therefore simultaneously upheld both a *negligence standard* for monetary verdicts under FACE and a *specific intent standard* for FACE injunctions—even as it denies that FACE requires specific intent![10] App. 25a-35a, 39a-45a. Thus, the jury was allowed to punish ACLA's statements even if they were *not intended* as threats, whereas the injunction purports to *protect the same statements*, absent a *specific intent* to threaten.

Because the injunction *permits* republication of the communications if there is no *specific* (subjective) intent to threaten, two conclusions follow: (1) The injunction *authorizes further "threats"* under the negligence standard given to the jury, despite the "poster pattern," and (2) the injunction recognizes that a negligence standard of "threats" is too restrictive for petitioners' political speech. App. 179a-184a. The injunction itself thus exposes the unconstitutionality of the verdict, as does the majority by endorsing this paradoxical result.

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[9] Evincing a double standard in abortion cases, the Ninth Circuit has elsewhere recognized that unlike threats against the President, threats against private citizens require "a subjective, specific intent to threaten." *United States v. Twine*, 853 F.2d 676, 680-81 (9th Cir. 1988); *accord United States v. Hanna*, 293 F.3d 1080, 1084 (9th Cir. 2002).

[10] In an effort to have it both ways, the majority suggested in *dicta* that FACE's requirement of intent to "intimidate" is just as good as specific intent. App. 26a-37a. But, intent to intimidate is not the same as intent to threaten force; FACE requires intimidation *by* a threat of force, not just intimidation. 18 U.S.C. § 248(a); App. 242a.

C. The Ninth Circuit's Conflict with the Second Circuit

In *United States v. Kelner*, 534 F.2d 1020, 1027 (2nd Cir. 1976), the court held that the First Amendment limits threats liability under 18 U.S.C. § 875(c) to a statement that "on its face and in the circumstances in which it was made is so *unequivocal, unconditional, immediate and specific* as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution...." The court expressly followed *Watts* and concluded that the requirement in *Watts* of a "*true* threat," like the standard enunciated in *Kelner*, has "much the same purpose and effect as would a requirement of proof of *specific intent*...." *Id.*

The Second Circuit recently applied *Kelner* to a threats claim under FACE. In *Spitzer v. Operation Rescue*, 273 F.3d 184, 196-97 (2nd Cir. 2001), the Second Circuit took a dim view of the New York Attorney General's claim of "threats" by pro-life advocates, including "killing babies is no different than killing doctors," noting that such statements would not meet the *Kelner* test.

Thus, the Ninth Circuit stands in direct conflict with the Second Circuit on what constitutes a threat of force under FACE. Political protesters in the Ninth Circuit can be punished under FACE for *any statement*, no matter how innocuous—even "replicating a poster pattern"—so long as the hypothetical "reasonable person" would "foresee [that the statement] would be interpreted" as a threat. But, in the Second Circuit, the *same protester* would not be punished, unless the statement at issue was "unequivocal, unconditional, immediate and specific" and conveyed "a gravity of purpose and imminent prospect of execution." *Kelner*, 534 F.2d at 1027. Clearly, "replicating" a "poster pattern" would not be a threat under the *Kelner* standard.

D. The Need For A Threat Standard Consistent With *Claiborne*

In her dissent, Judge Berzon (with Judges Kozinski, Kleinfeld, and Reinhardt) noted the need for a "threat" definition consistent with *Claiborne*. App. 79a-87a. Judge Berzon pointed to the *Kelner* standard—"unequivocal, unconditional, immediate and specific"—but would add the

requirement of specific (actual) intent in the *making* of the statement, while excising *Kelner*'s requirement of "imminent prospect of execution." App. 79a-87a.

Thus, Judge Berzon proposed that for threat claims under FACE and RICO *both* the *mens rea* (intention to threaten) and the *actus reus* (content of threat) be determined based on stringent First Amendment standards. App. 79a-87a. Judge Berzon's suggestion, combined with the *Kelner* requirement of imminence, supplies the proper level of First Amendment protection. The imminence requirement would be in keeping with *Brandenburg*'s imminence requirement for incitement claims, which ought to be no less applicable to an alleged threat by a public political speaker. *See* Steven Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 Tex. L. Rev. 541, 548-52 (2000).

The current inconsistent approach to threat claims poses a growing risk to all political protesters. Unless courts are held to a *strict and uniform* First Amendment standard for determining the existence of a true threat, the "poster pattern" will be joined by other imaginative ways of criminalizing political speech.

III. The Jury Was Not Confined By The New Liability Theory

Years after the trial had ended, the majority decided, for the first time, that *only* the undefined "wanted-style" *format* of ACLA's posters and the website's "scorecard" of doctors (in "conjunction with" the posters) were unprotected. App. 32a-33a, 39a-42a. This Court's guardianship of First Amendment liberty requires reversal if for no other reason than that the jury and district judge did not observe this more limited theory of liability.

As noted above in the Statement of the Case, the district judge allowed the jury to parse and punish *any aspect* of the communications. Respondents testified that the *words*—not just the "wanted-style" format—of the posters were "threatening," *e.g.*, Tr. 631-35, while their counsel exhorted the jury to punish ACLA for its words. Tr. 109. And, once again, even magazine articles *about* the "Deadly Dozen"

poster were presented to the jury as RICO predicate acts and FACE violations. L. 7-12.

Given the majority's own legal conclusions (as constitutionally defective as they are) the jury should have been instructed that the contents of the posters were protected. This would have made defense of the case vastly easier, because the only issue would have been whether a *format* could be a threat. The claim regarding the Nuremberg Files would have been dismissed outright under the majority's own theory, since it was undisputed at trial that Neal Horsley alone published the list of doctors with its "strikeouts" and "gray-outs." Tr. 2236-52, 2282-85.

A general verdict cannot stand on appeal if one of its possible bases is illegal. *See Griffin v. United States*, 502 U.S. 46 (1991). An appellate court cannot speculate that the jury limited itself to the legally correct theory: "When, therefore, jurors have been left the *option* of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from their error." *Id.* at 59. Because the district court allowed the jury to parse *the whole* of the communications for "threats," it cannot be speculated that the jurors limited themselves to what the majority now considers the unprotected aspects. Moreover, the injunction *manifestly* bans aspects of the communications that are now deemed protected. App. 181a-184a.

Thus, petitioners were tried under one set of rules, while the result was affirmed under another. Given its First Amendment context, this denial of due process cries out for rectification.[11]

IV. The Ninth Circuit's Novel Standard Of Review Conflicts With The Decisions of This Court and Other Circuits

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[11] Perhaps a worse denial of due process was the submission to the jury of a *statutorily non-existent* claim of civil "conspiracy to violate FACE." The majority, App. 50a n.16, failed to consider petitioners' argument that there was no subject matter jurisdiction to try this non-existent cause of action and that the error cannot be "waived." *See Insurance Co. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982); *Hagans v. Lavine*, 415 U.S. 528, 536-388 (1974).

Besides an unconstitutionally broad notion of "threat of force," the majority's affirmance depends on a novel, deferential standard of First Amendment review quite contrary to this Court's teaching. This Court has repeatedly held that appellate courts are obligated to "'make an independent examination of the whole record' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). This review standard applies to bench decisions and jury verdicts, and it is faithful to Fed.R.Civ.P. 52(a) and the Seventh Amendment. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499-511 & n.27 (1984).

De novo First Amendment review means that appellate courts *cannot defer* to a jury's decision to punish speech, since juries do not set the ultimate limits of First Amendment liberty. *E.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 567-68 (1995). As *Hurley*, 515 U.S. at 567, teaches:

> [O]ur review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct *an independent examination of the record as a whole, without deference to the trial court*.... This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and *we must thus decide for ourselves* whether a given course of conduct falls on the near or far side of the line of constitutional protection.

The key phrase in this teaching is "decide for ourselves." Anything less is not de novo review and will be insufficient to prevent local juries from eroding First Amendment liberty. The three-judge panel here followed the constitutionally mandated standard of review:

> Because the district court rejected the First Amendment claim, we conduct a *de novo* review of both the law and the relevant facts. The question therefore is not whether the facts found below are supported by the record but whether we, looking at the record with fresh eyes, make

> the same findings. *If we disagree with the district court, our findings prevail.*

App. 121a.

Even though the three-judge panel reviewed the First Amendment question de novo, the majority declined to follow suit, App. 8a, professing that "[i]t is not easy to discern a rule" for "threat" cases because true threats are "by definition...constitutionally unprotected." App. 19a. But, whether speech is constitutionally unprotected is precisely the matter to be reviewed de novo. As *Watts* and *Claiborne* make clear, the label "threats" does not alter the standard of review. The standard is still de novo.

Ignoring *Watts* and *Claiborne*, the majority devised a new standard of First Amendment review for "threat" cases. Although its precise nature is elusive, this novel standard involves *deference* to a jury's punishment of speech labeled a "threat" if "substantial evidence" exists in the record, construing in the prevailing party's favor, not only historical facts and credibility determinations, *but also the jury's findings on the statutory elements*—including the existence of a "threat" under FACE and the Hobbs Act. App. 8a, 19a-20a, 33a, 39a, 45a. Aided by these unheard-of presumptions *in favor of a verdict punishing public forum political speech*, the majority purported to conduct an "independent review" of the dispositive First Amendment question. Yet, the majority described this "independent review" as not "dramatically different from determining that the issue should have gone to the jury and that the jury was properly instructed under FACE." App. 39a. Concluding that "the verdict is supported by substantial evidence," App. 8a, 45a, the majority essentially deferred to the jury's decision to punish speech:

> As a result, we cannot say that it is clear as a matter of law that listing Crist, Hern, and the Newhalls on *both* the Nuremberg Files *and* the GUILTY posters is purely protected, political expression. Accordingly, whether the Crist Poster, the Deadly Dozen poster, and the identification of Crist, Hern, Dr. Elizabeth Newhall and

> Dr. James Newhall in the Nuremberg Files as well as on "wanted"-type posters, constituted true threats was properly for the jury to decide.

App. 33a (original emphasis). The majority called its review "independent," but the dissent rightly called it "broad and uncritical deference to the judgment of the jury...." App. 68a-69a.

This novel standard places the Ninth Circuit in clear conflict with this Court and other circuits. Although the circuits may differ somewhat in their expression of the rule, they agree that this Court requires them to review the core constitutional facts de novo and then *decide for themselves* whether the punished speech is protected.

Accordingly, the Eighth Circuit, even in a case involving *threats* of rape and murder, conducted de novo review on the core First Amendment question and related facts without devising any special standard of review for "threat" cases. *Doe v. Pulaski County Special Sch. Dist.*, No. 01-1048, 2002 WL 31114658 at *3 (8th Cir. Sept. 25, 2002) (en banc).

Another apt example of the circuit conflict is *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 897 (D.C. Cir. 1984), where the D.C. Circuit, unlike the majority here, examined a *poster* for itself and found it to be protected, non-deceptive speech. *See also, e.g., Howard v. Antilla*, 294 F.3d 244, 249 (1st Cir. 2002) ("In the ordinary case, we would review the evidence in the light most favorable to the prevailing plaintiff." But in First Amendment cases "this court must conduct an 'independent review of the evidence on the dispositive constitutional issue[s]'... [and] our review, at least on these matters, is *plenary*...."); *United States v. Scarfo*, 263 F.3d 80, 91 (3d Cir. 2001) (First Amendment cases mandate "a *searching, independent* factual review of the full record...."); *LLEH v. Wichita County*, 289 F.3d 358, 364-65 (5th Cir. 2002) (In First Amendment cases, "our 'review is *de novo*.'"), *petition for cert. filed* (U.S. Sept. 13, 2002) (No. 02-430); *Procter & Gamble v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) ("We review First Amendment questions *de novo*.").

Under the majority's new rule, political speakers accused of "threats" will be at the mercy of local juries, whose

crushing verdicts will receive minimal First Amendment scrutiny, while speakers accused of libel or incitement will receive full de novo First Amendment review. This Court should correct the Ninth Circuit's departure from the mandated standard of review.

IV. The Injunction is Unconstitutional

As the foregoing discussion makes obvious, the majority upheld as "finely tuned and exceedingly narrow," App. 44a, a sweeping injunction that defies this Court's teaching on invalid restraints of speech. *E.g.*, *Stanley v. Georgia*, 394 U.S. 557, 565-67 (1969); *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *see also* Dissents at App. 71a-72a n.11, 106a-107a n.10. The injunction chills the First Amendment liberty of an entire national protest movement and must be set aside.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 8, 2002

(Any footnotes trail the end of each document.)
No. 99-35320, No. 99-35325, No. 99-35327,
No. 99-35331, No. 99-35333, No. 99-35405

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
Plaintiffs-Appellees,

and KAREN SWEIGERT, M.D.,
Plaintiff,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID A. CRANE; TIMOTHY PAUL DRESTE; MICHAEL B. DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; STEPHEN P. MEARS; BRUCE EVAN MURCH; CATHERINE RAMEY; DAWN MARIE STOVER; CHARLES WYSONG,
Defendants,

and MONICA MIGLIORINO MILLER; DONALD TRESHMAN,
Defendants-Appellants.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
Plaintiffs-Appellees,

and KAREN SWEIGERT, M.D.,
Plaintiff,

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AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID A. CRANE; TIMOTHY PAUL DRESTE; JOSEPH L. FOREMAN; STEPHEN P. MEARS; MONICA MIGLIORINO MILLER; CATHERINE RAMEY; DAWN MARIE STOVER; DONALD TRESHMAN; CHARLES WYSONG,
Defendants,

and MICHAEL DODDS; CHARLES ROY MCMILLAN; BRUCE EVAN MURCH,
Defendants-Appellants.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
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Defendants,

and TIMOTHY PAUL DRESTE; JOSEPH L. FOREMAN; CHARLES WYSONG,
Defendants-Appellants.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
Plaintiffs-Appellees,

and KAREN SWEIGERT, M.D.,
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Defendants-Appellants,

and TIMOTHY PAUL DRESTE; MICHAEL DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; STEPHEN P. MEARS; MONICA MIGLIORINO MILLER; BRUCE EVAN MURCH; DONALD TRESHMAN; CHARLES WYSONG,
Defendants.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
Plaintiffs-Appellees,

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AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID A. CRANE; TIMOTHY PAUL

DRESTE; MICHAEL B. DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; BRUCE EVAN MURCH; CATHERINE RAMEY; DAWN MARIE STOVER; DONALD TRESHMAN; CHARLES WYSONG,
Defendants.

PAUL DEPARRIE,
Movant-Appellant.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.; KAREN SWEIGERT, M.D., individually and on behalf of all persons similarly situated,
Plaintiffs-Appellees,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID CRANE; TIMOTHY PAUL DRESTE; MICHAEL DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; MONICA MIGLIORINO MILLER; BRUCE EVAN MURCH; CATHERINE RAMEY; DAWN MARIE STOVER; DONALD TRESHMAN; CHARLES WYSONG,
Defendants-Appellants.

December 11, 2001, Argued and Submitted En Banc, Pasadena, California

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JUDGES:

Before: Mary M. Schroeder, Chief Judge, and Stephen Reinhardt, Alex Kozinski, Diarmuid F. O'Scannlain, Pamela Ann Rymer, Andrew J. Kleinfeld, Michael Daly Hawkins, Barry G. Silverman, Kim McLane Wardlaw, Marsha S. Berzon, and Johnnie B. Rawlinson, Circuit Judges. Opinion by Judge Rymer; Dissent by Judge Reinhardt; Dissent by Judge Kozinski; Dissent by Judge Berzon.

OPINIONBY:

Pamela Ann Rymer

OPINION:

RYMER, Circuit Judge:

For the first time we construe what the Freedom of Access to Clinics Entrances Act (FACE), 18 U.S.C. § 248, means by "threat of force." FACE gives aggrieved persons a right of action against whoever by "threat of force . . . intentionally . . . intimidates . . . any person because that person is or has been . . . providing reproductive health services. " 18 U.S.C. § 248(a)(1) and (c)(1)(A). This requires that we define "threat of force" in a way that comports with the First Amendment, and it raises the question whether the conduct that occurred here falls within the category of unprotected speech.

Four physicians, Dr. Robert Crist, Dr. Warren M. Hern, Dr. Elizabeth Newhall, and Dr. James Newhall, and two health

clinics that provide medical services to women including abortions, Planned Parenthood of the Columbia/Willamette, Inc. (PPCW) and the Portland Feminist Women's Health Center (PFWHC), brought suit under FACE [n1] claiming that they were targeted with threats by the American Coalition of Life Activists (ACLA), Advocates for Life Ministries (ALM), and numerous individuals. [n2] Three threats remain at issue: the Deadly Dozen "GUILTY" poster which identifies Hern and the Newhalls among ten others; the Crist "GUILTY "poster with Crist's name, addresses and photograph; and the" Nuremberg Files," which is a compilation about those whom the ACLA anticipated one day might be put on trial for crimes against humanity. The "GUILTY" posters identifying specific physicians were circulated in the wake of a series of "WANTED" and "unWANTED" posters that had identified other doctors who performed abortions before they were murdered.

Although the posters do not contain a threat on their face, the district court held that context could be considered. It defined a threat under FACE in accordance with our "true threat" jurisprudence, as a statement made when" a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm. "Applying this definition, the court denied ACLA's motion for summary judgment in a published opinion. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA (PPCW II)*, 23 F. Supp. 2d 1182 (D. Or. 1998). [n3] The jury returned a verdict in physicians' favor, and the court enjoined ACLA from publishing the posters or providing other materials with the specific intent to threaten Crist, Hern, Elizabeth Newhall, James Newhall, PPCW, or the Health Center. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA (PPCW III)*, 41 F. Supp. 2d 1130 (D. Or. 1999). ACLA timely appealed.

A panel of this court reversed. In its view, the standard adopted by the district court allowed the jury to find ACLA liable for putting the doctors in harm's way by singling them out for the attention of unrelated but violent third parties, conduct which is protected by the First Amendment, rather

than for authorizing or directly threatening harm itself, which is not. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA (PPCW IV)*, 244 F.3d 1007 (9th Cir.), *reh'g en banc granted*, 268 F.3d 908 (9th Cir. 2001). The panel decided that it should evaluate the record independently to determine whether ACLA's statements could reasonably be construed as saying that ACLA, or its agents, would physically harm doctors who did not stop performing abortions. Having done so, the panel found that the jury's verdict could not stand.

We reheard the case en banc because these issues are obviously important. We now conclude that it was proper for the district court to adopt our long-standing law on "true threats" to define a "threat" for purposes of FACE. FACE itself requires that the threat of force be made with the intent to intimidate. Thus, the jury must have found that ACLA made statements to intimidate the physicians, reasonably foreseeing that physicians would interpret the statements as a serious expression of ACLA's intent to harm them because they provided reproductive health services. Construing the facts in the light most favorable to physicians, the verdict is supported by substantial evidence. ACLA was aware that a "wanted"-type poster would likely be interpreted as a serious threat of death or bodily harm by a doctor in the reproductive health services community who was identified on one, given the previous pattern of "WANTED" posters identifying a specific physician followed by that physician's murder. The same is true of the posting about these physicians on that part of the "Nuremberg Files" where lines were drawn through the names of doctors who provided abortion services and who had been killed or wounded. We are independently satisfied that to this limited extent, ACLA's conduct amounted to a true threat and is not protected speech.

As we see no reversible error on liability or in the equitable relief that was granted, we affirm. However, we remand for consideration of whether the punitive damages award comports with due process.

I

The facts are fully set out in the district court's order granting injunctive relief, *PPWC III*, 41 F. Supp. 2d at 1131-1155, and we shall not belabor them. In sum:

On March 10, 1993, Michael Griffin shot and killed Dr. David Gunn as he entered an abortion clinic in Pensacola, Florida. Before this, a "WANTED" and an "unWANTED" poster with Gunn's name, photograph, address and other personal information were published. The "WANTED" poster describes Gunn as an abortionist and invites participation by prayer and fasting, by writing and calling him and sharing a willingness to help him leave his profession, and by asking him to stop doing abortions; the "unWANTED "poster states that he kills children at designated locations and "to defenseless unborn babies Gunn in [sic] heavily armed and very dangerous." After Gunn's murder, Bray and Paul Hill (a non-party who was later convicted of murdering a different doctor) prepared a statement supporting Griffin's acquittal on a justifiable homicide theory, which ALM, Burnett, Crane, Dodds, Foreman, McMillan, Ramey and Stover joined.

On August 21, 1993, Dr. George Patterson, who operated the clinic where Gunn worked, was shot to death. A "WANTED" poster had been circulated prior to his murder, indicating where he performed abortions and that he had Gunn perform abortions for his Pensacola clinic.

In July 1994, Dr. John Bayard Britton was murdered by Paul Hill after being named on an "unWANTED" poster that Hill helped to prepare. One gives Britton's physical description together with his home and office addresses and phone numbers, and charges "crimes against humanity"; another also displays his picture and states that "he is considered armed and extremely dangerous to women and children. Pray that he is soon apprehended by the love of Jesus!!!" In addition to these items, a third version of the Britton "unWANTED" poster lists personal achievements and Britton's "crimes against humanity," also warning that "John Bayard Britton is considered armed and extremely dangerous, especialy[sic] to women and children." ALM,

Bray, Burnett, Crane, McMillan, Ramey and Stover signed a petition supporting Hill.

Many pro-life activists in Operation Rescue condemned these acts of violence. As a result, ALM, Bray, Burnett, Crane, Foreman, McMillan, Ramey and Stover, who espoused a "pro-force" point of view, split off to form ACLA. Burnett observed, "if someone was to condemn any violence against abortion, they probably wouldn't have felt comfortable working with us." Organizational meetings were held in the spring of 1994, and ACLA's first event was held in August 1994. ACLA is based in Portland, Oregon, as is ALM. ALM publishes *Life Advocate*, a magazine that is distributed nationally and advocates the use of force to oppose the delivery of abortion services. Except for Bray, who authored *A Time to Kill* and served time in federal prison for conspiring to bomb ten clinics, the individual defendants were directors of ACLA and actively involved in its affairs. ALM commissioned and published Bray's book, noting that it "shows the connection between the [justifiable homicide] position and clinic destruction and the shootings of abortionists." Wysong and ACLA also drafted and circulated a "Contract on the Abortion Industry," having deliberately chosen that language to allude to mafia hit contracts.

ACLA presented the Deadly Dozen poster during a January 25, 1995 press conference at the March for Life event in Washington, D.C. Bray, Burnett, Crane, Dodds, Foreman, McMillan, Murch, Ramey, Stover, Treshman and Wysong were there; Dreste later ratified the poster's release. This poster is captioned "GUILTY" at the top (which meant the same thing to Crane, who drafted it, as "wanted"), beneath which in slightly smaller print the poster indicates" OF CRIMES AGAINST HUMANITY." The poster continues: "Abortion was provided as a choice for East European and Jewish women by the (Nazi) National Socialist Regime, and was prosecuted during the Nuremberg Trials (1945-46) under Allied Control Order No. 10 as a 'war crime.'" Under the heading "THE DEADLY DOZEN," the poster identifies thirteen doctors of whom James Newhall, Elizabeth Newhall, and Warren Hern are three. The poster provides Hern's residence and the home address of James Newhall and

Elizabeth Newhall; it also lists the name and home address of Dr. George Kabacy, a doctor who provided abortions at PPCW. It offers a "$ 5,000 REWARD" "for information leading to arrest, conviction and revocation of license to practice medicine." At the bottom the poster bears the legend "ABORTIONIST" in large, bold typeface. The day after the Deadly Dozen poster was released, the FBI offered protection to doctors identified on it and advised them to wear bulletproof vests and take other security precautions, which they did. Knowing this, ALM reprinted the poster in the March 1995 edition of its magazine *Life Advocate* under a cover with the "grim reaper" holding a scythe; Murch printed it in his newsletter *Salt & Light*; and ACLA republished the Deadly Dozen poster at events in August 1995 and January 1996.

ACLA released the Crist poster along with five others in August 1995 at the old federal courthouse in St. Louis where the *Dred Scott* decision had been handed down. Burnett, Crane, Dreste, McMillan, Ramey, Stover and Wysong attended the event. Three of the posters identify doctors; the others identify reproductive health care clinics, one of which was a Planned Parenthood affiliate where Crist worked. The Crist poster has "GUILTY" in large bold letters at the top followed by "OF CRIMES AGAINST HUMANITY" in smaller font. It also gives his home and work addresses; states "Please write, leaflet or picket his neighborhood to expose his blood guilt"; offers a "$ 500 REWARD" "to any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines"; and has "ABORTIONIST" in large bold type at the bottom.

At its January 1996 conference, ACLA displayed the Deadly Dozen poster, held a "White Rose Banquet" to honor prisoners convicted of anti-abortion violence, and introduced ALM's Paul deParrie to unveil the "Nuremberg Files." ACLA sent a hard copy of some of the Files to Neal Horsley (a nonparty) to post on the internet, and ACLA's name appeared on the Nuremberg Files website opened in January 1997. Approximately 200 people are listed under the label "ABORTIONISTS: the shooters," and 200 more are listed under Files for judges, politicians, law enforcement, spouses,

and abortion rights supporters. Crist, Hern and the Newhalls are listed in the "abortionists" section, which bears the legend: "Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)." The names of Gunn, Patterson and Britton are struck through.

By January 1995 ACLA knew the effect that "WANTED," "unWANTED," or "GUILTY" posters had on doctors named in them. For example, in a September 1993 issue of *Life Advocate* which reported that an "unwanted" poster was being prepared for Britton, ALM remarked of the Gunn murder that it "sent shock waves of fear through the ranks of abortion providers across the country. As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." Of another doctor who decided to quit performing abortions after circulation of a "Not Wanted" poster, Bray wrote that "it is clear to all who possess faculties capable of inductive analysis: he was bothered and afraid." Wysong also stated: "Listening to what abortionists said, abortionists who have quit the practice who are no longer killing babies but are now pro-life. They said the two things they feared the most were being sued for malpractice and having their picture put on a poster." And Burnett testified with respect to the danger that "wanted" or "guilty" posters pose to the lives of those who provide abortions: "I mean, if I was an abortionist, I would be afraid."

By January 1995 the physicians knew about the Gunn, Patterson and Britton murders and the posters that preceded each. Hern was terrified when his name appeared on the Deadly Dozen poster; as he put it: "The fact that wanted posters about these doctors had been circulated, prior to their assassination, and that the – that the posters, then, were followed by the doctor's assassination, emphasized for me the danger posed by this document, the Deadly Dozen List, which meant to me that – that, as night follows day, that my name was on this wanted poster . . . and that I would be assassinated, as had the other doctors been assassinated." Hern interpreted the poster as meaning "Do what we tell you to do, or we will kill you. And they do." Crist was "truly frightened," and stopped practicing medicine for a while out of fear for his life. Dr. Elizabeth Newhall interpreted the

Deadly Dozen poster as saying that if she didn't stop doing abortions, her life was at risk. Dr. James Newhall was "severely frightened" in light of the "clear pattern" of a wanted poster and a murder when there was "another wanted poster with my name on it."

The jury found for plaintiffs on all claims except for Bray and Treshman on the RICO claims. [4] The district court then considered equitable relief. It found that each defendant used intimidation as a means of interfering with the provision of reproductive health services; that each independently and as a co-conspirator published and distributed the Deadly Dozen poster, the Crist poster, and the Nuremberg Files; and that each acted with malice and specific intent in communicating true threats to kill, assault or do bodily harm to each of the plaintiffs to intimidate them from engaging in legal medical practices and procedures. The court found that the balance of hardships weighed "overwhelmingly" in plaintiffs' favor. It also found that the defendants' actions were not protected speech under the First Amendment. Accordingly, it issued a permanent injunction restraining defendants from threatening, with the specific intent to do so, any of the plaintiffs in violation of FACE; from publishing or distributing the Deadly Dozen poster and the Crist poster with specific intent to threaten the plaintiffs; from providing additional material concerning plaintiffs, with a specific intent to threaten, to the Nuremberg Files or similar web site; and from publishing or distributing the personally identifying information about the plaintiffs in the Files with a specific intent to threaten. The court also required defendants to turn over materials that are not in compliance with the injunction except for one copy of anything included in the record, which counsel was permitted to retain.

II

Before turning to the merits, we must consider the standard of review because ACLA contends that in a free speech case it is de novo. Relying on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984), ACLA submits that we must first determine for ourselves whether its speech is classic

protected speech or is a "true threat" by reviewing the entire record.

Physicians assert that the standard of review for which ACLA contends comes from libel cases, but that threat cases are different; the more searching review of the record incumbent upon courts in libel cases, they urge, is inapposite to threat cases. They also point out that we have decided all of our threats cases without engaging in de novo review of the factual record. *See, e.g., United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989) (*Gilbert II*) ("Viewed as a whole, and using the contextual analysis we have used for other statutes, a rational trier of fact could find a threat."); *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir. 1992) ("Although some of the factual circumstances surrounding the incident suggest a contrary result, the jury acted reasonably[in finding that] the threats were serious."); *United States v. Orozco-Santillan*, 903 F.2d 1262, 1266 (9th Cir. 1990) ("[A] rational jury could conclude that Orozco-Santillan's statement . . . was a threat."); *see also United States v. Hoff*, 22 F.3d 222, 224 (9th Cir. 1994) (reviewing for clear error conviction for intimidating forest ranger).

We do not entirely agree with either side. It is true that our threats cases have been decided without conducting a de novo review of the factual record, but the issue was not squarely presented in any of those cases. For this reason, we cannot take it as definitively resolved.

In *Bose* (a defamation action arising out of a publication about loudspeaker systems), the Court confronted an apparent conflict between Federal Rule of Civil Procedure 52(a), providing that findings of fact shall not be set aside unless clearly erroneous, and its rule in cases raising First Amendment issues that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose*, 466 U.S. at 498-99 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284, 11 L. Ed. 2d 686, 84 S. Ct. 710-86 (1964)). The Court noted that it had previously exercised independent judgment on questions such as whether particular remarks

are "fighting words," *Street v. New York*, 394 U.S. 576, 592, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969), and whether, as a matter of constitutional law, a motion picture is obscene. *Jenkins v. Georgia*, 418 U.S. 153, 159, 41 L. Ed. 2d 642, 94 S. Ct. 2750-61 (1974). In this connection, the Court observed that in *Jenkins* it had rejected the notion that a jury finding (there of obscenity) "is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings"; rather, substantive constitutional limitations govern. *Bose*, 466 U.S. at 506-07. Therefore, it concluded, appellate judges must themselves determine whether the record establishes the constitutional facts required for showing actual malice with convincing clarity in a case governed by *New York Times*. This obligation does not, however, extend to any evidence that is not germane to the actual malice (or core constitutional fact) determination. *Id.* at 514 n.31.

The Court revisited the issue in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989). *Harte-Hanks* was a libel action against a newspaper, also governed by *New York Times*. The court of appeals had affirmed a judgment against the paper without attempting to make an independent evaluation of the credibility of conflicting oral testimony concerning the facts underlying the jury's finding of actual malice. Certiorari was granted to consider whether the appellate court's analysis was consistent with *Bose*. *Harte-Hanks* conceded that when conducting the independent review required by *New York Times* and *Bose*, a reviewing court should properly hesitate to disregard a jury's opportunity to observe live testimony and assess witness credibility, but contended that the Supreme Court had nevertheless rejected the trial court's credibility determination in *Bose*. Justice Stevens, writing for the Court in both *Bose* and *Harte-Hanks*, noted that this was not correct; he explained that in *Bose* the Court had accepted the trial court's determination that the author of the report at issue did not provide credible testimony, but had been unwilling to infer actual malice from the finding. *Id.* at 689 n.35. The *Harte-Hanks* Court went on to review the entire

record, holding that given the instructions, the jury's answers to special interrogatories, and the facts that were not in dispute, the jury must have found certain testimony incredible and that from these findings, considered with the undisputed evidence, it followed that the paper acted with actual malice and that the evidence was sufficient to support such a finding.

The same rule was reiterated in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 132 L. Ed. 2d 487, 115 S. Ct. 2338 (1995), a First Amendment case involving a parade permit. As the Court explained: "This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.* at 567.

We have discussed the issue a number of times, in connection with threats in *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984), *United States v. Gilbert (Gilbert I)*, 813 F.2d 1523 (9th Cir. 1987), *Melugin v. Hames*, 38 F.3d 1478 (9th Cir. 1994), and *Lovell v. Poway United School Dist.*, 90 F.3d 367 (9th Cir. 1996), and in defamation actions in *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir. 1990), *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997), and *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

Merrill was prosecuted for mailing injurious articles through the mail (letters with live .22 caliber rim fire bullets, some with the words "Kill Reagan," some with pornographic playing cards) and for threatening the life of the President in violation of 18 U.S.C. § 871. ACLA relies on that part of *Merrill* where we considered the obscenity conviction under the *Bose* standard of review. We interpreted *Bose* and *Smith v. United States*, 431 U.S. 291, 52 L. Ed. 2d 324, 97 S. Ct. 1756 (1977), as allowing deferential (sufficiency of the evidence) review of findings about contemporary community standards and the offensiveness of the material, but as requiring more extensive review of the district court's findings that Miller's letters lacked serious political value. *Smith*, 431 U.S. at 305

(whether a work lacks serious literary, artistic, political, or scientific value for purposes of an obscenity prosecution is a "determination . . . particularly amenable to appellate review"). However, we did not apply heightened review to the threats conviction. Instead, we stated:

> Whether any given form of written or oral expression constitutes a true threat for the statute's[§ 871] purposes is a question for the trier of fact under all of the circumstances. *Roy v. United States*, 416 F.2d [874,] 877-78 [(9th Cir. 1969)]. A few cases may be so clear that they can be resolved as a matter of law, *e.g.*, *Watts v. United States*, 394 U.S. 705, 22 L. Ed. 2d 664, 89 S. Ct. 1399 [](1969) (conditional statement made at political rally which provoked listeners' laughter was merely "political hyperbole," and question should not have gone to jury), but most cases arising under this statute present widely varying fact patterns that should be left to the trier of fact. *United States v. Carrier*, 672 F.2d [300,] 306 [(2d Cir. 1982)].

Merrill, 746 F.2d at 462-63. Under this standard we held that the district judge was not clearly erroneous in finding that the letters constituted an objectively serious threat to harm the President.

We followed *Merrill* in *Gilbert I*, 813 F.2d at 1529-30. Gilbert was charged with violating the Fair Housing Act, 42 U.S.C. § 3631(b) and (c), by mailing menacing flyers to intimidate the director of an adoption organization responsible for the placement and adoption of black and Asian children from aiding minority children's occupancy of dwellings in Kootenai County. Noting that whether expression is a true threat is for the trier of fact, we recognized that "whether any given form of written expression can supply the requisite intent requirement is a question for the trier of fact." *Gilbert I*, 813 F.2d at 1529. Thus, "it is a jury question whether actions and communications are clearly outside the ambit of first

amendment protection." *Id.* at 1530. And following the Seventh Circuit's lead in *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990), we held in *Melugin* that "the issue whether the prosecution has shown a 'true threat' is a question of fact for the jury, not a question of law for the court." *Melugin*, 38 F.3d at 1485.

Lovell was a § 1983 action in which a student was suspended for allegedly threatening to shoot a teacher. We acknowledged that "different standards are sometimes used when reviewing district court cases in which the court adjudged the constitutionality of a restriction on speech," and that a de novo review of the facts is conducted when a restriction is upheld. *Lovell*, 90 F.3d at 370.

Newton was a defamation action brought by Wayne Newton (a public figure) against NBC. It was tried to a jury, which found actual malice. The appeal caused us specifically to consider how "to strike the proper balance between our constitutional (Seventh Amendment) deference to the factfinder and our constitutional duty to safeguard First Amendment values" in light of *Bose* and *Harte-Hanks*. *Newton*, 930 F.2d at 666. We observed that the "independent examination of the record" contemplated by *Bose* is "'not equivalent to a "de novo" review of the ultimate judgment itself,'" where the reviewing court makes an "original appraisal of all the evidence to decide whether or not judgment should be entered for the plaintiff." *Id.* at 670 n.10 (quoting *Bose*, 466 U.S. at 514 n.31). However, we also noted that as a general rule, we have conducted de novo review of the record when a restriction on speech has been upheld. *Id.* (citing *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988)). We then read *Bose* and *Harte-Hanks* as creating a "credibility exception" to the New York Times rule of independent review, such that we give "special deference" to credibility determinations but conduct "a more searching review of other evidence" germane to the actual malice determination. 930 F.2d at 671, 672.

Eastwood was another defamation action in which we engaged in an independent review of actual malice. We thought that the jury was properly instructed, but in

conducting the review we explained that "it is not enough for us to determine that a reasonable jury could have found for the plaintiff – a kind of sufficiency-of-the-evidence test, permitting us to affirm even though we would have reached a different conclusion. Rather, 'First Amendment questions of "constitutional fact" compel [us to conduct a] de novo review.' We ourselves must be convinced that the defendant acted with malice," even though we defer to the jury on questions of credibility. *Eastwood*, 123 F.3d at 1252 (citations omitted). *See also* *Hoffman*, 255 F.3d at 1186 (relying on *Eastwood*).

It is not easy to discern a rule from these cases that can easily be applied in a threats case where, by definition, a true threat is constitutionally unprotected. Indeed, FACE on its face requires that "threat of force" be defined and applied consistent with the First Amendment. Perhaps this explains why we have treated threat cases differently, explicitly holding that the question of whether there is a true threat is for the jury.

We conclude that the proper definition of a "threat" for purposes of FACE is a question of law that we review de novo. If it were clear that neither the Deadly Dozen nor the Crist poster, or the Nuremberg Files, was a threat as properly defined, the case should not have gone to the jury and summary judgment should have been granted in ACLA's favor. If there were material facts in dispute or it was not clear that the posters were protected expression instead of true threats, the question whether the posters and the Files amount to a "threat of force" for purposes of the statute was for the trier of fact. Assuming that the district court correctly defined "threat" and properly instructed the jury on the elements of liability pursuant to the statute, our review is for substantial evidence supporting the historical facts (including credibility determinations) and the elements of statutory liability (including intent). We review the district court's findings with respect to injunctive relief for clear error and its conclusions of law de novo. However, while we normally review the scope of injunctive relief for abuse of discretion, we will scrutinize the relief granted in this case to determine whether the challenged provisions of the injunction burden

no more speech than necessary to achieve its goals. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765, 129 L. Ed. 2d 593, 114 S. Ct. 2516 (1994).

Given that the verdict for physicians and the injunctive relief granted in their favor restrict speech, we review the record independently in order to satisfy ourselves that the posters and the Files constitute a "true threat" such that they lack First Amendment protection. We will consider the undisputed facts as true, and construe the historical facts, the findings on the statutory elements, and all credibility determinations in favor of the prevailing party. In this way we give appropriate deference to the trier of fact, here both the jury and the district judge, yet assure that evidence of the core constitutional fact – a true threat – falls within the unprotected category and is narrowly enough bounded as a matter of constitutional law.

III

ACLA[n5] argues that the First Amendment requires reversal because liability was based on political speech that constituted neither an incitement to imminent lawless action nor a true threat. It suggests that the key question for us to consider is whether these posters can be considered "true threats" when, in fact, the posters on their face contain no explicitly threatening language. Further, ACLA submits that classic political speech cannot be converted into non-protected speech by a context of violence that includes the independent action of others.

Physicians[n6] counter that this threats case must be analyzed under the settled threats law of this circuit. Following precedent, it was proper for the jury to take context into account. They point out that the district court limited evidence of antiabortion violence to evidence tending to show knowledge of a particular defendant, and maintain that the objective standard on which the jury was instructed comports both with Ninth Circuit law and congressional intent. As the First Amendment does not protect true threats of force, physicians conclude, ACLA's speech was not protected.

A

We start with the statute under which this action arises. Section 248(c)(1)(A) gives a private right of action to any person aggrieved by reason of the conduct prohibited by subsection (a). Subsection (a)(1) provides:

> (a) . . . Whoever–
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . shall be subject to the . . . civil remedies provided in subsection (c) . . . .

18 U.S.C. § 248(a)(1). The statute also provides that "nothing in this section shall be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 248(d)(1).

FACE does not define "threat," although it does provide that "the term 'intimidate' means to place a person in reasonable apprehension of bodily harm to him-or herself or to another." 18 U.S.C. § 248(e)(3). Thus, the first task is to define "threat" for purposes of the Act. This requires a definition that comports with the First Amendment, that is, a "true threat."

The Supreme Court has provided benchmarks, but no definition.

Brandenburg v. Ohio, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827, 48 Ohio Op. 2d 320 (1969), makes it clear that the First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or producing imminent lawless action and is not likely to incite or produce such action. So do *Hess v. Indiana*, 414 U.S. 105,

38 L. Ed. 2d 303, 94 S. Ct. 326 (1973) (overturning disorderly conduct conviction of antiwar protestor who yelled "We'll take the fucking street later (or again)"), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982). If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected.

However, while advocating violence is protected, threatening a person with violence is not. In *Watts v. United States*, 394 U.S. 705 (1969), the Court explicitly distinguished between political hyperbole, which is protected, and true threats, which are not. Considering how to construe a statute which prohibited "knowingly and willfully . . . (making) any threat to take the life of or to inflict bodily harm upon the President," the Court admonished that any statute which criminalizes a form of pure speech "must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* at 705, 707. In that case, an 18-year old war protester told a discussion group of other young people at a public rally on the Washington Monument grounds: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. His audience laughed. Taken in context, and given the conditional nature of the statement and the reaction of the listeners, the Court concluded that the speech could not be interpreted other than as "a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708. Accordingly, it ordered judgment entered for Watts.

ACLA's position is that the posters, including the Nuremberg Files, are protected political speech under *Watts*, and cannot lose this character by context. But this is not correct. The Court itself considered context and determined that Watts's statement was political hyperbole instead of a true threat because of context. *Id.* at 708. Beyond this, ACLA points out that the posters contain no language that is a threat. We agree that this is literally true. Therefore, ACLA

submits, this case is really an incitement case in disguise. So viewed, the posters are protected speech under *Brandenburg* and *Claiborne*, which ACLA suggests is the closest analogue. We disagree that *Claiborne* is closely analogous.

In March 1966 black citizens in Claiborne County made a list of demands for racial equality and integration. Unsatisfied by the response, several hundred black persons at a meeting of the local National Association for the Advancement of Colored People (NAACP) voted to place a boycott on white merchants in the area. The boycott continued until October 1969. During this period, stores were watched and the names of persons who violated the boycott were read at meetings of the NAACP at the First Baptist Church, and published in a local paper called "Black-Times." These persons were branded as traitors to the black cause, were called demeaning names, and were socially ostracized. A few incidents of violence occurred. Birdshot was fired at the houses of two boycott violators; a brick was thrown through a windshield; and a flower garden was damaged. None of the victims ceased trading with white merchants. Six other incidents of arguably unlawful conduct occurred. White business owners brought suit against the NAACP and Charles Evers, its field secretary, along with other individuals who had participated in the boycott, for violating Mississippi state laws on malicious interference with a business, antitrust, and illegal boycott. Plaintiffs pursued several theories of liability: participating in management of the boycott; serving as an "enforcer" or monitor; committing or threatening acts of violence, which showed that the perpetrator wanted the boycott to succeed by coercion when it could not succeed by persuasion; and as to Evers, threatening violence against boycott breakers, and as to the NAACP because he was its field secretary when he committed tortious and constitutionally unprotected acts. Damages for business losses during the boycott and injunctive relief were awarded.

The Court held that there could be no recovery based on intimidation by threats of social ostracism, because offensive and coercive speech is protected by the First Amendment. "The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But

violent conduct is beyond the pale of constitutional protection." 458 U.S. at 933. There was some evidence of violence, but the violence was not pervasive as it had been in *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 85 L. Ed. 836, 61 S. Ct. 552 (1941). Accordingly, the Court made clear that only losses proximately caused by unlawful conduct could be recovered. Further, civil liability could not be imposed consistent with the First Amendment solely on account of an individual's association with others who have committed acts of violence; he must have incited or authorized them himself.

For the same reasons the Court held that liability could not be imposed on Evers for his participation in the boycott itself, or for his threats of vilification or ostracism. However, the merchants also sought damages from Evers for his speeches. He gave one in April 1966, and two others in April 1969. In the first, he told his audience that they would be watched and that blacks who traded with white merchants would be answerable to him; he also said that any "uncle toms" who broke the boycott would "have their necks broken" by their own people. In his April 19, 1969 speech, Evers stated that boycott violators would be "disciplined" by their own people and warned that the Sheriff could not sleep with boycott violators at night. And on April 21, Evers gave another speech to several hundred people calling for a total boycott of white-owned businesses and saying: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." The Court concluded that the "emotionally charged rhetoric" of Evers's speeches was within the bounds of *Brandenberg*. It was not followed by violence, and there was no evidence – apart from the speeches themselves – that Evers authorized, ratified, or directly threatened violence. "If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence." *Claiborne*, 458 U.S. at 929. As there was not, the findings were constitutionally inadequate to support the damages judgment against him and, in turn, the NAACP.

Claiborne, of course, did not arise under a threats statute. The Court had no need to consider whether Evers's

statements were true threats of force within the meaning of a threats statute; it held only that his speeches did not incite illegal activity, thus could not have caused business losses and could not be the basis for liability to white merchants. As the opinion points out, there was no context to give the speeches (including the expression "break your neck") the implication of authorizing or directly threatening unlawful conduct. To the extent there was any intimidating overtone, Evers's rhetoric was extemporaneous, surrounded by statements supporting non-violent action, and primarily of the social ostracism sort. No specific individuals were targeted. For all that appears, "the break your neck" comments were hyperbolic vernacular. Certainly there was no history that Evers or anyone else associated with the NAACP had broken anyone's neck who did not participate in, or opposed, this boycott or any others. Nor is there any indication that Evers's listeners took his statement that boycott breakers' "necks would be broken" as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores.

Thus, *Watts* was the only Supreme Court case that discussed the First Amendment in relation to true threats before we first confronted the issue. Apart from holding that Watts's crack about L.B.J. was not a true threat, the Court set out no standard for determining when a statement is a true threat that is unprotected speech under the First Amendment. Shortly after *Watts* was rendered, we had to decide in *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969), whether a Marine Corps private made a true threat for purposes of 18 U.S.C. § 871 against the President, who was coming to his base the next day, by saying: "I am going to get him." We adopted a "reasonable speaker" test. As it has come to be articulated, the test is:

> Whether a particular statement may properly be considered to be a threat is governed by an objective standard – whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker

> communicates the statement as a serious expression of intent to harm or assault.

United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990).

We have applied this test to threats statutes that are similar to FACE, *see, e.g.*, *United States v. Gilbert (Gilbert II)*, 884 F.2d 454, 457 (9th Cir. 1989) (Fair Housing Act banning threat of force to intimidate person based on race and housing practices, 42 U.S.C. § 3631); *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir. 1987) (threats against the President, 18 U.S.C. § 871); *Merrill*, 746 F.2d at 462-63 (same); *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir. 1992) (threat to kill a former President, 18 U.S.C. § 879); *Orozco-Santillan*, 903 F.2d at 1265 (threats to assault a law enforcement officer with intent to intimidate, 18 U.S.C. § 115); *Melugin*, 38 F.3d at 1483-84 (threat to influence judicial proceeding under Alaska state law); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1222 (9th Cir. 1990) (threat to disrupt conference under California's Unruh Act); and *Lovell*, 90 F.3d at 371 (9th Cir. 1996) (§ 1983 action involving threat to shoot teacher). Other circuits have, too.[n7] We see no reason not to apply the same test to FACE.[n8]

Under our cases, a threat is "an expression of an intention to inflict evil, injury, or damage on another." *Gilbert II*, 884 F.2d at 457; *Orozco-Santillan*, 903 F.2d at 1265. "Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." *Orozco-Santillan*, 903 F.2d at 1265; *see also Mitchell*, 812 F.2d at 1255 (citing *Watts*, 394 U.S. at 708; *Merrill*, 746 F.2d at 462; *Roy*, 416 F.2d at 876). "'The fact that a threat is subtle does not make it less of a threat.'" *Orozco-Santillan*, 903 F.2d at 1265 (quoting *Gilbert II*, 884 F.2d at 457). A true threat, that is one "where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment." *Id.* (citing *Merrill*, 746 F.2d at 462).

It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true

threat is that the defendant intentionally or knowingly communicate the threat. *Orozco-Santillan*, 903 F.2d at 1265 n.3; *Gilbert II*, 884 F.2d at 456-57; *Mitchell*, 812 F.2d at 1256 (upholding § 871 conviction of defendant with no capacity to carry out threat); *Roy*, 416 F.2d at 877.[n9] Other circuits are in accord.[n10] Nevertheless, we are urged to adopt a subjective intent requirement for FACE. In particular, amicus ACLU Foundation of Oregon, Inc., advocates a subjective intent component to "require evidence, albeit circumstantial or inferential in many cases, that the speaker actually *intended* to induce fear, intimidation, or terror; namely, that the speaker intended to threaten. If a person did not intend to threaten or intimidate (i.e., did not intend that his or her statement be understood as a threat), then the speech should not be considered to be a 'true threat,' unprotected by the First Amendment." However, this much is subsumed within the statutory standard of FACE itself, which requires that the threat of force be made with the intent to intimidate. The "requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech." *Gilbert I*, 813 F.2d at 1529 (construing the Fair Housing Act's threat provision, 42 U.S.C. § 3631, which is essentially the same as FACE's). No reason appears to engraft another intent requirement onto the statute, because whether or not the maker of the threat has an actual intention to carry it out, "an apparently serious threat may cause the mischief or evil toward which the statute was in part directed." *Gilbert II*, 884 F.2d at 458 (quoting *Roy*, 416 F.2d at 877).

The dissents would change the test, either to require that the speaker actually intend to carry out the threat or be in control of those who will, or to make it inapplicable when the speech is public rather than private. However, for years our test has focused on what a *reasonable speaker* would foresee the *listener's* reaction to be under the circumstances, and that is where we believe it should remain. *See Madsen*, 512 U.S. at 773 (noting that "threats . . . however communicated, are proscribable under the First Amendment, and indicating that display of signs "that could be interpreted as threats or veiled threats" could be prohibited). Threats are outside the

First Amendment to "protect[]individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur. " *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992). This purpose is not served by hinging constitutionality on the speaker's subjective intent or capacity to do (or not to do) harm. Rather, these factors go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm. This suffices to distinguish a "true threat" from speech that is merely frightening. Thus, no reasonable speaker would foresee that a patient would take the statement "You have cancer and will die within six months," or that a pedestrian would take a warning "Get out of the way of that bus," as a serious expression of intent to *inflict* bodily harm; the harm is going to happen anyway.

Neither do we agree that threatening speech made in public is entitled to heightened constitutional protection just because it is communicated publically rather than privately. As *Madsen* indicates, threats are unprotected by the First Amendment "however communicated." *Madsen*, 512 U.S. at 753. [n11]

Therefore, we hold that "threat of force" in FACE means what our settled threats law says a true threat is: a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person. So defined, a threatening statement that violates FACE is unprotected under the First Amendment.

B

Although ACLA does not believe we should reach this point, if we do it submits that no claim was made out even under "true threats" cases. First, it argues that other threats cases were criminal actions against someone who made a real threat directly to others, not political speech as is the case here. It contrasts what it calls "a threat plus context" present in *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), and in other out-of-circuit cases, [n12] with the absence of

a direct threat in this case. However, our cases do not require that the maker of the threat personally cause physical harm to the listener. In *Orozco-Santillan*, we made it clear that the speaker did not need to be able to carry out the threat. Likewise in *Mitchell*, the speaker could not possibly have done so. In *Gilbert*, the threatening letter mentions neither the intended victim nor who would carry out the threat. No case to our knowledge has imposed such a requirement, [n13] and we decline to now. It is the making of the threat with intent to intimidate – not the implementation of it – that violates FACE.

We do not understand *Dinwiddie* to hold anything different. *Dinwiddie* was also a civil suit under FACE. Mrs. Dinwiddie made comments to Crist outside his clinic, warning "Robert, remember Dr. Gunn . . . This could happen to you . . . He is not in the world anymore. Whoever sheds man's blood, by man his blood shall be shed." 76 F.3d at 917. She also said: "You have not seen violence yet until you see what we do to you." *Id.* Writing for the Eighth Circuit, Judge Richard S. Arnold explained that in applying FACE's prohibition on using "threats of force," courts or juries must differentiate between "true threats" and protected speech. The alleged threat must be analyzed in light of its entire factual context to determine whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future. As outlined in the opinion, the Eighth Circuit considers a number of factors when deciding whether statements constitute threats of force: the reaction of the recipient and of other listeners, whether the threat was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim in the past, and whether the victim had reason to believe that the maker had a propensity to engage in violence, but the list is not exhaustive and the presence or absence of any of these things is not dispositive. *Id.* at 925. The court concluded that although Mrs. Dinwiddie did not specifically say to Dr. Crist, "I am going to injure you," the statements in context, and Crist's reaction to them, show that they were "threats of force" that "intimidated" Crist. The court also noted that the fact that

Mrs. Dinwiddie did not specifically say to Crist that *she* would injure him does not mean that her comments were not "threats of force." *Id.* at 925 n.9. Accordingly, the court upheld an injunction ordering Mrs. Dinwiddie to stop violating FACE (which, as it pointed out, would have a *de minimis* effect on her ability to express herself) and approved the injunction's nationwide scope.

ACLA also maintains that "context" means the direct circumstances surrounding delivery of the threat, or evidence sufficient to resolve ambiguity in the words of the statement -- not two weeks of testimony as occurred here in the district court. Otherwise, ACLA submits, FACE is facially invalid. However, none of our cases has limited "context "to explaining ambiguous words, or to delivery. We, and so far as we can tell, other circuits as well, consider the whole factual context and "all of the circumstances," *Merrill*, 746 F.2d at 462, in order to determine whether a statement is a true threat. ACLA points to *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976), but the Second Circuit's view is not to the contrary, as we noted in *Lovell*. *Lovell*, 90 F.3d at 372. The defendant in *Kelner*, who threatened to assassinate Yasser Arafat during a radio broadcast that also contained protected political expression, argued that this insulated his threat from prosecution; the court observed that this was not the case "so long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *Kelner*, 534 F.2d at 1027. In *Kelner* as well as in *Lovell*, the threatening statement was considered in context to determine if it were a true threat or not. *See United States v. Malik*, 16 F.3d 45, 50 (2d Cir. 1994) (once there is sufficient extrinsic evidence to show that an ordinary and reasonable recipient would interpret letter as threat, case should go to the jury).

Indeed, context is critical in a true threats case and history can give meaning to the medium. Use of Ryder trucks – which the Eighth Circuit found to be a true threat in *United States v. Hart*, 212 F.3d 1067 (8th Cir. 2000) – is an example that is strikingly similar to the use of "wanted"-type posters in

this case. Hart, who was a known anti-abortion activist, parked two Ryder trucks in the driveways of an abortion clinic. He was prosecuted and convicted of violating FACE. The court held that Hart had threatened the clinic to intimidate it by using Ryder trucks, because a Ryder truck had been used in the Oklahoma City bombing of the Murrah Federal Building. Hart knew the clinicians knew this and would fear for their lives. Thus, use of the Ryder truck was a true threat. Like the poster format here, the Ryder truck in *Hart* was a symbol of something beyond the vehicle: there, a devastating bomb; in this case, murder. [n14]

ACLA's contention that allowing consideration of context beyond the direct circumstances surrounding delivery of the words themselves creates a facial invalidity in FACE and the Hobbs Act is unavailing. Of the courts to consider the constitutionality of threats statutes, including the United States Supreme Court in *Watts*, all have upheld constitutionality and ACLA points to none that has disallowed consideration of context.[n15] This makes sense, because without context, a burning cross or dead rat mean nothing. In any event, the requirement of intent to intimidate cures whatever risk there might be of overbreadth.

Nor does consideration of context amount to viewpoint discrimination, as ACLA contends. ACLA's theory appears to be that because the posters did not contain any threat on their face, the views of abortion foes are chilled more than the views of abortion-right proponents because of the random acts of violence committed by some people against abortion providers. However, FACE itself is viewpoint neutral. *See, e.g.*, *United States v. Weslin*, 156 F.3d 292, 296-97 (2d Cir. 1998); *United States v. Wilson*, 154 F.3d 658, 663 (7th Cir. 1998) ("The Act punishes anyone who engages in the prohibited conduct, irrespective of the person's viewpoint and does not target any message based on content. 'The Access Act thus does not play favorites: it protects from violent or obstructive activity not only abortion clinics, but facilities providing pre-pregnancy and pregnancy counseling services, as well as facilities counseling alternatives to abortion.'") (quoting *Terry v. Reno*, 101 F.3d 1412, 1419 (D.C. Cir. 1996)). Moreover, ACLA could not be liable under FACE

unless *it* made a true threat *with the intent to intimidate* physicians. Thus it is making a threat to intimidate that makes ACLA's conduct unlawful, not its viewpoint.

Because of context, we conclude that the Crist and Deadly Dozen posters are not just a political statement. Even if the Gunn poster, which was the first "WANTED" poster, was a purely political message when originally issued, and even if the Britton poster were too, by the time of the Crist poster, the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released. Knowing this, and knowing the fear generated among those in the reproductive health services community who were singled out for identification on a "wanted"-type poster, ACLA deliberately identified Crist on a "GUILTY" poster and intentionally put the names of Hern and the Newhalls on the Deadly Dozen "GUILTY" poster to intimidate them. This goes well beyond the political message (regardless of what one thinks of it) that abortionists are killers who deserve death too.

The Nuremberg Files are somewhat different. Although they name individuals, they name hundreds of them. The avowed intent is "collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity." The web page states: "One of the great tragedies of the Nuremberg trials of Nazis after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes. We do not want the same thing to happen when the day comes to charge abortionists with their crimes. We anticipate the day when these people will be charged in PERFECTLY LEGAL COURTS once the tide of this nation's opinion turns against child-killing (as it surely will)." However offensive or disturbing this might be to those listed in the Files, being offensive and provocative is protected under the First Amendment. But, in two critical respects, the Files go further. In addition to listing judges, politicians and law enforcement personnel, the Files separately categorize "Abortionists" and

list the names of individuals who provide abortion services, including, specifically, Crist, Hern, and both Newhalls. Also, names of abortion providers who have been murdered because of their activities are lined through in black, while names of those who have been wounded are highlighted in grey. As a result, we cannot say that it is clear as a matter of law that listing Crist, Hern, and the Newhalls on *both* the Nuremberg Files *and* the GUILTY posters is purely protected, political expression.

Accordingly, whether the Crist Poster, the Deadly Dozen poster, and the identification of Crist, Hern, Dr. Elizabeth Newhall and Dr. James Newhall in the Nuremburg Files as well as on "wanted"-type posters, constituted true threats was properly for the jury to decide.

C

ACLA next argues that the true threat instructions require reversal because they permitted consideration of motive, history of violence including the violent actions of others, and the defendants' subjective motives as part of context. We have already explained why it is proper for the whole factual context and all the circumstances bearing on a threat to be considered. The court also instructed the jury to consider evidence presented by the defense of non-violence and permissive exercise of free speech. That the contextual facts may have included the violent actions of others does not infect the instruction, because the issue is whether a reasonable person should have foreseen that the Crist Guilty Poster, the Deadly Dozen Poster, and the Nuremberg Files, would be interpreted as a serious threat of harm by doctors who provide abortions and were identified on them.

ACLA also contends that the district court employed the wrong standard of intent, allowing the jury to find in physicians' favor regardless of ACLA's subjective intent. The court instructed: "A statement is a 'true threat' when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault." This language is taken from *Orozco-Santillan*, 903 F.2d at 1265, is an accurate statement of our

law, and is faithful to the objective standard we use for determining whether a statement is a true threat. For reasons we have already explained, we decline to read into FACE (or the Hobbs Act) a specific intent to threaten violence or to commit unlawful acts in addition to the intent to intimidate which the statute itself requires.

ACLA additionally faults the court for failing to provide any standard of intent because the elements instruction merely states that FACE is violated by "a threat of force to intimidate or interfere with, or attempt to intimidate or interfere with" physicians' ability to provide reproductive health services. As best we can tell, this boils down to a complaint that the instruction did not say "in order to" between "threat of force" and "to intimidate." However, this is the plain import of the instruction.

ACLA further suggests that the conspiracy instruction, combined with the "attempt to intimidate" instruction, could have resulted in liability for an "attempt to threaten" without proof of an actual threat.[n16] We do not see how, because the jury had to find a true threat before reaching any other FACE or RICO issues. ACLA also posits that the standard form instruction, "if you find a defendant was a member of a conspiracy, that defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not that defendant knew what they said or did," had the effect in this case of violating the rule of *Claiborne* that one cannot be held accountable for the speech of others by reason of mere association, absent ratification or adoption of it. However, the jury was instructed that a person does not become a conspirator merely by associating with one or more persons who are conspirators; rather, one becomes a member of a conspiracy by willfully participating in an unlawful plan with the intent to advance or further some object or purpose of it. There is no right to associate with others to engage in activities that are unlawful and unprotected by the First Amendment, as the making of true threats to intimidate providers of reproductive health services is. *Madsen*, 512 U.S. at 776 (upholding injunction restraining abortion protestors acting in concert with defendants). The Seventh Circuit had occasion to consider (and reject) a similar

argument made by abortion protestors who had been convicted of conspiring to violate FACE in *United States v. Wilson*, 154 F.3d 658, 666-67 (7th Cir. 1998). It explained that the Supreme Court in *Claiborne* was referring to individuals who were engaging in a peaceful protest and thus were properly exercising their First Amendment rights, whereas FACE is aimed at those who themselves intend to intimidate and thereby deprive others of their lawful rights. As in *Wilson*, we are not persuaded that the instructions allowed any defendant in this case to be found liable for threats to intimidate for which he or she was not responsible. They either participated in making them, or agreed that they should be made.

Finally, we note that the jury was instructed that "even speech that is coercive may be protected if the speaker refrains from violence or from making a true threat. Moreover, the mere abstract teaching of the moral propriety or even moral necessity for resort to force and violence is protected speech under the First Amendment." It was reminded that "plaintiffs' claims are based only on the three statements I have listed for you," and that it should determine the case as to each defendant and each claim separately. Accordingly, the court did not abuse its discretion in formulating the instructions, nor was the jury incorrectly instructed as a matter of law on true threats or the elements of FACE. [n17]

D

ACLA joins in Treshman's assertion that the court erroneously admitted prejudicial evidence by permitting: an FBI agent and two federal marshals to testify that the FBI and the Justice Department considered ACLA's two posters to be "serious threats"; references to non-party violence; introduction of defendants' arrests; physicians' counsel to tell the jury about Bray's invocations of the Fifth Amendment through a summary of his deposition; references to actions of certain defendants and non-parties on the abortion debate and to such things as the signing of "Defensive Action petitions" by five or six of the individual defendants; an exhibit with Rev. Sullivan's hearsay opinion that ACLA is a

"cancer" which pro-lifers must "cut out immediately" before it "destroys the pro-life movement" to remain in the exhibit books; and by permitting deposition summaries to be introduced. ACLA recognizes that evidentiary rulings are normally reviewed for an abuse of discretion, but argues that in cases raising First Amendment issues appellate courts must independently examine the record for evidentiary errors which penalize political speech or allow "a forbidden intrusion on the field of free expression." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990) (citation omitted). We decline ACLA's invitation to review evidentiary rulings de novo. No case of which we are aware suggests that the obligation to examine the record independently extends so far. Nor do we believe that appellate judges should retry cases, as ACLA's proposal would have us do. Accordingly, we review the district court's evidentiary rulings in this case, as we do evidentiary rulings in all cases, for abuse of discretion. None appears.

Testimony about the law enforcement officers' response to the Crist and Deadly Dozen "GUILTY" posters had some tendency to show the physicians' state of mind when they found out they were named on "wanted"-type posters, as well as to show the knowledge and intent of ACLA in distributing the posters regardless of the reaction they precipitated. Both are non-hearsay purposes. No testimony was allowed about what officers thought the posters meant. That FBI agents and United States Marshals advised physicians to take security precautions relates to how Crist, Hern, and the Newhalls perceived their own safety. The court admonished the jury that it should not conclude that these agencies had decided that the threats were "true threats." We assume that the jury followed the court's limiting instruction, *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899-900 (9th Cir. 1996), which cured whatever potential there may have been for an unduly prejudicial effect from admission of this testimony.

ACLA's knowledge of prior violence and its effect on reproductive health services providers bore directly on its intent to intimidate physicians, and was limited by the district court to that relevant purpose. Bray's invocation of the Fifth Amendment was not improperly admitted as to him in a civil

trial. *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998). Coconspirator statements were admissible so long as they were connected to the conspiracy and the jury found that the statements were made in furtherance of it. The same is true of the Defensive Action petitions, which were clearly admissible against those defendants who signed them and as to others with whom the signatories were conspiring. Speech does not become inadmissible to show context or intent simply because standing alone it is protected. *Wisconsin v. Mitchell*, 508 U.S. 476, 489, 124 L. Ed. 2d 436, 113 S. Ct. 2194-90 (1993) (First Amendment does not prohibit evidentiary use of speech to show motive or intent); *Dinwiddie*, 76 F.3d at 918, 925, n.10 (although advocacy of view that violence is justifiable is protected, it was appropriate for district court to consider plaintiff's awareness of defendant's advocacy of lethal force in determining whether defendant intimidated him with threats of force). Terry Sullivan was at the Chicago meeting that led to the founding of ACLA, and to the extent that he expressed any opinion about how ACLA was undermining a commitment to nonviolence, it was part of what happened at the time, was relevant to show that ACLA knew how its actions were being interpreted, and was within the district court's discretion to admit once Sullivan's testimony had laid a foundation. Neither Sullivan nor Flip Benham was available to testify at trial; as both had been examined at a deposition, their former testimony was not excluded by the hearsay rule, Fed. R. Evid. 804(b), and its presentation in the form of summaries was within the court's discretion under Rule 611(a). *Oostendorp v. Khanna*, 937 F.2d 1177, 1180 (7th Cir. 1991) (requiring deposition summaries not an abuse of discretionary authority to regulate conduct of civil trials); *Walker v. Action Indus., Inc.*, 802 F.2d 703, 712 (4th Cir. 1986) (same); *Kinglsey v. Baker/Beech-Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir. 1977) (same); MANUAL FOR COMPLEX LITIGATION, Third, § 22.331 (1995).[n18]

E

ACLA also joins Treshman's argument that mistrials should have been granted because a juror objected to use of the word "abortionist"; the judge made a remark about Bill

Clinton in admonishing a witness to tell the truth; jurors were invited to watch a criminal sentencing proceeding; three jurors had a conversation with one of the physicians during a lunch hour; and physicians' counsel likened defendants to the Oklahoma City and World Trade Center bombers and Islamic terrorists during his closing. We are asked to review the record de novo on this issue as well, although ACLA acknowledges that the normal standard for refusing to grant mistrials is abuse of discretion. We decline to change our standard, and see no reversible error.

When a juror informed the court that the defense's use of the term "abortionist" was becoming distracting, the district court instructed the jury that "it is perfectly legal, and proper, and within any free speech right, for one group, that is opposing another group, to refer to them in the terms they choose. And it's clear the pro-life people, traditionally, I believe, call abortion providers abortionists. So, there should not be any adverse reaction to these people using the lingo and terminology of their protest." The jurors all responded that they could live with that, and keep an open mind with respect to all the evidence. There was no objection to the process, and no abuse of discretion on account of taking no further action. Similarly, after learning of a chance encounter in the courthouse elevator between Elizabeth Newhall and three jurors in the presence of defense counsel, the court inquired whether the jurors had discussed anything substantive and whether their judgment would be impaired by the contact. They responded negatively and the court acted within its discretion in taking no further action. The court also instructed that anything the jury may have seen or heard when the court was not in session is not evidence, and that the case was to be decided solely on the evidence received at trial. Finally, ACLA fails to explain why allowing the jurors to watch two sentencing proceedings was objectionable or prejudicial, and we cannot see how it was.

The judge himself recognized that his Clinton reference was inappropriate. He apologized to the jury about it, and explained that the court was attempting to suggest to the witness that she should just go ahead and answer a question. (The witness had remarked to counsel after being impeached

with a prior inconsistent statement under oath, "I am not sure what you mean by truthful.") The judge told jurors to put his comment out of their minds, permitted the defense to re-open direct examination to allow the witness to explain her prior answer, and told the jury again in his final instructions that any remarks of his were not to be taken as an indication of how much weight to give the testimony of any witness. Whatever the impropriety, it was cured.

As might be expected, closing argument was robust on both sides; the court gave all counsel considerable latitude. Images of famous and infamous figures alike were evoked. The district judge was in the best position to decide whether any particular reference went too far. The court reminded the jury that counsels' statements were not evidence, and we cannot say that the defense was so prejudiced by the argument that a mistrial should have been granted.

F

Having concluded that "threat of force" was properly defined and that no trial error requires reversal, we consider whether the core constitutional fact – a true threat – exists such that the Crist and Deadly Dozen Posters, and the Nuremberg Files as to Crist, Hern, and the Newhalls, are without First Amendment protection. The task in this case does not seem dramatically different from determining that the issue should have gone to the jury and that the jury was properly instructed under FACE. Nevertheless, we review the evidence on true threats independently.

The true threats analysis turns on the poster pattern. Neither the Crist poster nor the Deadly Dozen poster contains any language that is overtly threatening. Both differ from prior posters in that the prior posters were captioned "WANTED" while these are captioned "GUILTY." The text also differs somewhat, but differences in caption or words are immaterial because the language itself is not what is threatening. Rather, it is use of the "wanted"-type format in the context of the poster pattern – poster followed by murder – that constitutes the threat. Because of the pattern, a "wanted"-type poster naming a specific doctor who provides abortions was perceived by physicians, who are providers of

reproductive health services, as a serious threat of death or bodily harm. After a "WANTED" poster on Dr. David Gunn appeared, he was shot and killed. After a "WANTED" poster on Dr. George Patterson appeared, he was shot and killed. After a "WANTED" poster on Dr. John Britton appeared, he was shot and killed. None of these "WANTED" posters contained threatening language, either. Neither did they identify who would pull the trigger. But knowing this pattern, knowing that unlawful action had followed "WANTED" posters on Gunn, Patterson and Britton, and knowing that "wanted"-type posters were intimidating and caused fear of serious harm to those named on them, ACLA published a "GUILTY" poster in essentially the same format on Dr. Crist and a Deadly Dozen "GUILTY" poster in similar format naming Dr. Hern, Dr. Elizabeth Newhall and Dr. James Newhall because they perform abortions. Physicians could well believe that ACLA would make good on the threat. One of the other doctors on the Deadly Dozen poster had in fact been shot before the poster was published. This is not political hyperbole. Nor is it merely "vituperative, abusive, and inexact." *Watts*, 394 U.S. at 708 (comparing language used in political arena to language used in labor disputes). In the context of the poster pattern, the posters were precise in their meaning to those in the relevant community of reproductive health service providers. They were a true threat.

The posters are a true threat because, like Ryder trucks or burning crosses, they connote something they do not literally say, yet both the actor and the recipient get the message. To the doctor who performs abortions, these posters meant "You're Wanted or You're Guilty; You'll be shot or killed." This was reinforced by the scorecard in the Nuremberg Files. The communication was not conditional or casual. It was specifically targeted. Crist, Hern, and the Newhalls, who performed abortions, were not amused. *Cf. Watts*, 394 U.S. at 708 (no true threat in political speech that was conditional, extemporaneous, and met with laughter); *Claiborne*, 458 U.S. at 928 (spontaneous and emotional appeal in extemporaneous speech protected when lawless action not incited).

The "GUILTY" posters were publicly distributed, but personally targeted. While a privately communicated threat is generally more likely to be taken seriously than a diffuse public one, this cannot be said of a threat that is made publicly but is about a specifically identified doctor and is in the same format that had previously resulted in the death of three doctors who had also been publicly, yet specifically, targeted. There were no individualized threats in *Brandenberg*, *Watts* or *Claiborne*. However, no one putting Crist, Hern, and the Newhalls on a "wanted"-type poster, or participating in selecting these particular abortion providers for such a poster or publishing it, could possibly believe anything other than that each would be seriously worried about being next in line to be shot and killed. And they were seriously worried.

As a direct result of having a "GUILTY" poster out on them, physicians wore bullet-proof vests and took other extraordinary security measures to protect themselves and their families. ACLA had every reason to foresee that its expression of intent to harm (the "GUILTY" poster identifying Crist, Hern, Elizabeth Newhall and James Newhall by name and putting them in the File that tracks hits and misses) would elicit this reaction. Physicians' fear did not simply happen; ACLA intended to intimidate them from doing what they do.

This is the point of the statute and is conduct that we are satisfied lacks any protection under the First Amendment.

Violence is not a protected value. Nor is a *true threat* of violence *with intent to intimidate*. ACLA may have been staking out a position for debate when it merely advocated violence as in Bray's *A Time to Kill*, or applauded it, as in the Defense Action petitions. Likewise, when it created the Nuremberg Files in the abstract, because the First Amendment does not preclude calling people demeaning or inflammatory names, or threatening social ostracism or vilification to advocate a political position. *Claiborne*, 458 U.S. at 903, 909-12. But, after being on "wanted"-type posters, Dr. Gunn, Dr. Patterson, and Dr. Britton can no longer participate in the debate. By replicating the poster pattern

that preceded the elimination of Gunn, Patterson and Britton, and by putting Crist, Hern, and the Newhalls in an abortionists' File that scores fatalities, ACLA was not staking out a position of debate but of threatened demise. This turns the First Amendment on its head.

Like "fighting words," true threats are proscribable. We therefore conclude that the judgment of liability in physicians' favor is constitutionally permissible.

IV

ACLA submits that the damage award must be reversed or limited to the compensatory damages because the punitive award amounts to judgment without notice contrary to *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996). We have since discussed the subject in depth in *In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir. 2001). Although our review is de novo, the district court should be given the opportunity to evaluate the punitive damages award and to make findings with respect to its propriety. Therefore, we vacate the award of punitive damages and remand for the district court to consider in the first instance whether the award is appropriate in light of *Exxon Valdez*.

V

After trial, the district court found that each defendant used intimidation as a means of interfering with the provision of reproductive health services and acted with malice and with specific intent in threatening physicians. It found that physicians remain threatened by ACLA's threats, and have no adequate remedy at law. The court concluded that physicians had proved by clear and convincing evidence that each defendant acting independently and as a co-conspirator prepared and published the Deadly Dozen Poster, the Crist Poster, and the Nuremberg Files with specific intent to make true threats to kill or do bodily harm to physicians, and to intimidate them from engaging in legal medical practices. It "totally rejected the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the

plaintiffs from providing abortion services." *PPCW III*, 41 F. Supp. 2d at 1154. Applying *Madsen's* standard, the court found that ACLA's actions were not protected under the First Amendment. Accordingly, it permanently enjoined each of the defendants, their agents, and all persons in active concert with any of them who receive actual notice, from threatening, with the specific intent to do so, Crist, Hern, Dr. Elizabeth Newhall, Dr. James Newhall, PPCW and PFWHC in violation of FACE; publishing, republishing, reproducing or distributing the Deadly Dozen Poster, or the Crist poster, or their equivalent, with specific intent to threaten physicians, PPCW or PFWHC; and from providing additional material concerning Crist, Hern, either Newhall, PPCW or PFWHC to the Nuremberg Files or any mirror web site with a specific intent to threaten, as well as from publishing the personally identifying information about them in the Nuremberg Files with a specific intent to threaten. The court also ordered ACLA to turn over possession of materials that are not in compliance with the injunction.

ACLA complains principally about the restraint on possessing the posters. Pointing to *Stanley v. Georgia*, 394 U.S. 557, 567, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969), where the Court observed that "the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits," ACLA contends that the injunction treats the posters worse than obscenity. However, the posters in this case are quite different from a book; the "wanted"-type posters themselves – not their ideological content – are the tool for threatening physicians. In this sense the posters' status is more like conduct than speech. *Cf. United States v. O'Brien*, 391 U.S. 367, 376, 20 L. Ed. 2d 672, 88 S. Ct. 1673-82 (1968) (explaining distinction between speech and conduct, and holding that expressive aspect of conduct does not exempt it from warranted regulation). The First Amendment interest in retaining possession of the threatening posters is *de minimis*, while ACLA's continued possession of them constitutes part of the threat. The court heard all the evidence, which included testimony that some

defendants obstructed justice and ignored injunctions. Accordingly, we cannot say that the turn-over order was broader than necessary to assure that this particular threat will not be used again.

ACLA also suggests that the injunction is an improper prior restraint on speech because it prohibits dissemination of the posters. It is not. The Supreme Court has rejected the notion that all injunctions which incidentally affect expression are prior restraints. *Madsen*, 512 U.S. at 764 n.2; *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374 n.6 (1997). Like *Madsen* and *Schenck*, the injunction here was not issued because of the content of ACLA's expression, but because of prior unlawful conduct.

The terms of the injunction are finely tuned and exceedingly narrow. Only threats or use of the posters or their equivalent with the specific intent to threaten Crist, Hern, either Newhall, PPCW or PFWHC are prohibited. Only personal information about these particular persons may not be used in the Nuremberg Files with the specific intent to threaten them. This leaves huge room for ACLA to express its views. [n19]

CONCLUSION

A "threat of force" for purposes of FACE is properly defined in accordance with our long-standing test on "true threats," as "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." This, coupled with the statute's requirement of intent to intimidate, comports with the First Amendment.

We have reviewed the record and are satisfied that use of the Crist Poster, the Deadly Dozen Poster, and the individual plaintiffs' listing in the Nuremberg Files constitute a true threat. In three prior incidents, a "wanted"-type poster identifying a specific doctor who provided abortion services was circulated, and the doctor named on the poster was killed. ACLA and physicians knew of this, and both understood the significance of the particular posters

specifically identifying each of them. ACLA realized that "wanted" or "guilty" posters had a threatening meaning that physicians would take seriously. In conjunction with the "guilty" posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on a hit list. To this extent only, the Files are also a true threat. However, the Nuremberg Files are protected speech.

There is substantial evidence that these posters were prepared and disseminated to intimidate physicians from providing reproductive health services. Thus, ACLA was appropriately found liable for a true threat to intimidate under FACE.

Holding ACLA accountable for this conduct does not impinge on legitimate protest or advocacy. Restraining it from continuing to threaten these physicians burdens speech no more than necessary.

Therefore, we affirm the judgment in all respects but for punitive damages, as to which we remand.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Footnotes

n1 We refer collectively to the plaintiffs as "physicians" unless reference to a particular party is required. In addition to FACE, the case went to trial on claims that the same conduct violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 (except that ACLA was alleged to be the RICO enterprise and was not a defendant on this claim), and on claims that the defendants conspired to violate FACE and RICO. As each claim turns on whether there were true threats without constitutional protection, the appeal and our opinion focus only on FACE.

n2 Michael Bray, Andrew Burnett, David A. Crane, Timothy Paul Dreste, Joseph L. Foreman, Stephen P. Mears, Monica Migliorino Miller, Catherine Ramey, Dawn Marie Stover, Donald Treshman, and Charles Wysong. We refer to them collectively as "ACLA."

n3 The court had previously denied ACLA's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA (PPCW I)*, 945 F. Supp. 1355 (D. Or. 1996).

n4 On the FACE claims, the jury awarded $ 39,656 to Crist, $ 14,429 to Hern, $ 15,797.98 to Elizabeth Newhall, $ 375 to James Newhall, $ 405,834.86 to PPCW, and $ 50,243 to PFWHC from each defendant as compensatory damages and $ 14.5 million to Crist, $ 13 million to Hern, $ 14 million to Elizabeth Newhall, $ 14 million to James Newhall, $ 29.5 million to PPCW, and $ 23.5 million to PFWHC in punitive damages. On the RICO claims (after trebling), Crist was awarded $ 892,260; Hern, $ 324,657; Elizabeth Newhall, $ 355,454; James Newhall, $ 8,442; PPCW $ 9,131,280; and PFWHC, $ 1,130,466.

n5 Treshman and Miller filed a separate brief. We treat their arguments with ACLA's, as each adopts the others' brief. An amicus curiae brief in support of reversal was also submitted on behalf of The Thomas Jefferson Center for the Protection of Free Expression. Paul deParrie submitted a pro se, non-party-in-interest brief challenging the permanent injunction entered by the district court, and an amicus brief in opposition to reconsideration of the panel opinion.

n6 Amicus briefs in support of affirmance were submitted on behalf of the American Medical Association; seventeen United States Senators and forty-two United States Representatives; the State of Connecticut; the Anti-Defamation League, the American Jewish Committee, and Hadassah, the Women's Zionist Organization of America, Inc.; Feminist Majority Foundation, Center for Reproductive Law and Policy, National Abortion and Reproductive Rights Action League and NARAL Foundation, National Abortion Federation, National Coalition of Abortion Providers, National Organization for Women Foundation, NOW Legal Defense and Education Fund, National Women's Health Foundation, Northwest Women's Law Center, Physicians for Reproductive Choice and Health, and Women's Law Project; and the ACLU Foundation of Oregon, Inc.

n7 *See, e.g., United States v. Whiffen*, 121 F.3d 18, 20-21

(1st Cir. 1997) (statement is threat under 18 U.S.C. § 875(c) if reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir. 1997) (Second Circuit approach to threats, adopted in *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976), is objective test and requires assessing whether a reasonable recipient of statement would construe it as threat in light of context); *United States v. Kosma*, 951 F.2d 549, 556-57 (3d Cir. 1991) (statement is threat under 18 U.S.C. § 871 if reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994) (statement is threat under 18 U.S.C. § 875(c) if reasonable person would interpret the statement as threat); *United States v. Morales*, 272 F.3d 284, 287 (5th Cir. 2001) (statement is threat under 18 U.S.C. § 875(c) if recipient placed in reasonable fear of bodily harm); *United States v. Landham*, 251 F.3d 1072, 1080 (6th Cir. 2001) (statement is threat under 18 U.S.C. § 875(c) if reasonable recipient of message would interpret it as expression of intent to harm); *United States v. Hartbarger*, 148 F.3d 777, 782-83 (7th Cir. 1998) (cross burning is threat under 42 U.S.C. § 3631 because the reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Hart*, 212 F.3d 1067, 1072 (8th Cir. 2000) (placing Ryder truck in driveway of abortion clinic is threat under FACE because, in light of entire factual context, person would reasonably conclude that the act expresses an intent to harm); *United States v. Magleby*, 241 F.3d 1306, 1311-13 (10th Cir. 2001) (cross burning is threat under the Fair Housing Act, 42 U.S.C. § 3631, because reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Callahan*, 702 F.2d 964, 965-66 (11th Cir. 1983) (statement is threat under 18 U.S.C. § 871 if reasonable person would construe statement as expression of intent to harm); *Metz v. Dep't of Treasury*, 780 F.2d 1001, 1002 (Fed. Cir. 1986) (threat evaluated by reasonable listener considering numerous factors).

Although all now apply an objective standard, several circuits have a "reasonable listener" test while others have a "reasonable speaker" test as we do. The difference does not

appear to matter much because all consider context, including the effect of an allegedly threatening statement on the listener.

n8 Both the House and Senate specifically referred to *Gilbert's* interpretation of the Fair Housing Act's threat provision in adopting FACE's quite similar text. H. Rep. No. 103-306, at n.19 (1993); S. Rep. No. 103-117, at 29 (1993).

n9 We have held that 18 U.S.C. § 876, which criminalizes knowingly mailing any communication containing a threat to injure, is a specific intent crime. *United States v. Twine*, 853 F.2d 676 (9th Cir. 1988); *United States v. King*, 122 F.3d 808 (9th Cir. 1997). However, we were not defining "threat" or considering what a true threat is, and we made it clear that specific intent or ability to carry out the threat is not an essential element. *King*, 122 F.3d at 810 (quoting *Twine*, 853 F.2d at 681 n.4).

n10 *See, e.g., United States v. Francis*, 164 F.3d 120, 123 (2d Cir. 1999) (rejecting addition of substantive intent requirement to objective test); *United States v. Miller*, 115 F.3d 361, 363-64 (6th Cir. 1997) (same); *United States v. Aman*, 31 F.3d 550, 553-56 (7th Cir. 1994) (same); *United States v. Patrick*, 117 F.3d 375, 377 (8th Cir. 1997) (same); *United States v. Martin*, 163 F.3d 1212, 1215-16 (10th Cir. 1998) (same). *But see United States v. Patillo*, 438 F.2d 13, 15 (4th Cir. 1971) (including subjective intent element in § 871). The Fourth Circuit has abandoned this approach in its other true threat cases.

n11 Judge Reinhardt chides us for failing to accord public speech more protection than private speech. He misses the point. *Threats*, in whatever forum, may be independently proscribed without implicating the First Amendment. See e.g., *Schenk v. Pro-Choice Network of Western New York*, 519 U.S. 357, 373, 137 L. Ed. 2d 1, 117 S. Ct. 855 (1997) (so indicating in case involving public protest against abortion providers); *Madsen*, 512 U.S. at 774 (same); *Kelner*, 534 F.2d 1020 (JDL press conference in connection with public demonstration about the Palestine Liberation Organization and its leader); *Hart*, 212 F.3d 1067 (public protest against abortion providers).

Nor does *Bauer v. Sampson*, 261 F.3d 775 (9th Cir. 2001), turn on a public/private distinction, as Judge Kozinski's dissent suggests. No heightened scrutiny was given to the professor's speech on account of the fact that it had to do with a campus debate. Rather, the *Orozco-Santillan* test was applied, and we concluded that even though there was some violent content to his writings and cartoons, in the context of the underground campus newspaper in which they appeared, they would be perceived as hyperbole instead of as a serious expression of intent to inflict bodily harm.

n12 It relies on *United States v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999) (threat that bomb will be activated in 15 pre-selected major cities); *United States v. Schiefen*, 139 F.3d 638 (8th Cir. 1998) (personal letter sent to judge); *United States v. Khorrami*, 895 F.2d 1186 (7th Cir. 1990) (telephone calls and wanted posters sent directly to Jewish National Fund stating "death to the Fucking JNF"); *United States v. Cooper*, 865 F.2d 83 (4th Cir. 1989) (scoping out areas in Washington, D.C. to blow Rajiv Gandhi's brains out); *United States v. Kosma*, 951 F.2d 549 (3d Cir. 1991) (threat that 21 guns are going to put bullets through President Reagan's heart and brain); *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976) (statement over radio that people are trained who are out now and intend to make sure that Arafat is assassinated); *United States v. Sovie*, 122 F.3d 122 (2d Cir. 1997) (reiterating Second Circuit test that "true threat" is one that "on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution"); *United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997) (silver bullets are coming; considered in context, appeared to be a threat).

n13 To the contrary, in *Viefhaus*, for example, the threat consisted of a hotline message from an unnamed person that violent acts would be executed by unnamed persons. In *Khorrami*, the purveyor of a "Crimes Against Humanity" poster made no statement that he would be the one to implement the threat. And in *United States v. Bellrichard*, 994 F.2d 1318 (8th Cir. 1993), letters warned that God or unnamed parties would kill the addressees. The same is true

of *Kelner*, where the court noted that it was not necessary under § 875(c) (prescribing a communication containing a threat) for the government to prove that Kelner had a specific intent or a present ability to carry out his threat. 534 F.2d at 1023.

n14 *See also, e.g., United States v. Magleby*, 241 F.3d 1306 (10th Cir. 2001) (cross burning).

n15 *See, e.g., United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998); *United States v. Wilson*, 154 F.3d 658 (7th Cir. 1998); *United States v. Bird*, 124 F.3d 667 (5th Cir. 1997); *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997); *Terry v. Reno*, 322 U.S. App. D.C. 124, 101 F.3d 1412 (D.C. Cir. 1996); *United States v. Soderna*, 82 F.3d 1370 (7th Cir. 1996); *Dinwiddie*, 76 F.3d 913; *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995).

n16 ACLA argues more broadly that no claim for conspiracy to violate FACE exists, but we decline to consider the issue because it is raised for the first time on appeal. *Los Angeles News Serv. v. Reuters Television Int'l Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998). It had every opportunity to assert this view in the district court before judgment, having moved to dismiss, for summary judgment, and for judgment as a matter of law as well as having objected to proposed instructions (but not on conspiracy). Failing to raise the issue until now, absent any exceptional circumstances or change in the law, prejudices both the plaintiffs and the process. Considerable time and resources were devoted to litigating these claims to verdict. In any event, we cannot see that substantial injustice occurred. FACE came into being in part because of "organized," "concerted" campaigns by "groups" to disrupt access to reproductive health services, S. Rep. No. 103-117, at 6-7 (1993), and the instruction effectively channeled the jury away from finding defendants liable for mere association and instead required it to find that each defendant threatened physicians intending to intimidate them or willfully joined with others to do so. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 776 (1994) (freedom of association protected by First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights).

n17 ACLA cites other errors in the Hobbs Act and RICO instructions but offers no authority in support. Neither does it indicate that any objection on these issues was preserved. Its argument on appeal is not developed. In any event, the instructions appear to track model instructions and are not obviously wrong. For these reasons, we do not discuss these challenges and summarily reject them.

ACLA also contends that the court compromised its right to a fair trial by telling the jury that the United States Supreme Court has declared that women have a constitutional right to abortion, and no one is permitted to violate the law because of their views about abortion. It objected on the ground that the charge was "death to us" but makes no substantial argument on appeal why there was reversible error on this account. We summarily reject this argument as well.

n18 After noting that the decision to admit deposition testimony at all is within the sound discretion of the district court, Judge Flaum explained in *Oostendorp*:

> It follows that the court may control the manner in which deposition testimony is presented; indeed, trial courts are charged to "exercise reasonable control" over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth [and to] avoid needless consumption of time . . . Fed. R. Evid. 611(a). The district court adopted its rule to serve these objectives, and we agree that requiring deposition summaries can be a reasonable means of implementing the mandate of Rule 611. We therefore conclude that the district court's requirement was not an abuse of its discretionary authority to regulate the conduct of civil trials.

Oostendorp, 937 F.2d at 1179-1180.

We hold only, for these reasons, that the district court did not abuse its discretion in requiring summaries in lieu of transcripts. As there was no challenge along the lines of Judge Berzon's dissent to the particular summaries that were presented, we have no occasion to consider whether the court did or did not err in receiving them.

n19 Assuming that he has standing, deParrie's challenges fail for most of the same reasons. The district court found that he was an employee and agent of ALM and it is proper for the injunction to apply to him as well. Fed. R. Civ. P. 65.

DISSENTBY:
Stephen Reinhardt; Alex Kozinski; Marsha S. Berzon

DISSENT:

REINHARDT, Circuit Judge, with whom KOZINSKI, KLEINFELD, and BERZON, Circuit Judges, join, dissenting:

I concur fully in both Judge Kozinski's and Judge Berzon's dissents. The differences between the majority and dissenting opinions with respect to the First Amendment are clear. I write separately to emphasize one point: the majority rejects the concept that speech made in a political forum on issues of public concern warrants heightened scrutiny. *See* Majority Op. at 28a. This rejection, if allowed to stand, would significantly weaken the First Amendment protections we now enjoy. It is a fundamental tenet of First Amendment jurisprudence that political speech in a public arena is different from purely private speech directed at an individual. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926-27 (1982); *Watts v. United States*, 394 U.S. 705, 708 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 93 L. Ed. 1131, 69 S. Ct. 894 (1949). Political speech, ugly or frightening as it may sometimes be, lies at the heart of our democratic process. Private threats delivered one-on-one do not. The majority's unwillingness to recognize the difference is

extremely troublesome. For this reason alone, I would be compelled to dissent.

KOZINSKI, Circuit Judge, with whom Circuit Judges REINHARDT, O'SCANNLAIN, KLEINFELD and BERZON join, dissenting:

The majority writes a lengthy opinion in a vain effort to justify a crushing monetary judgment and a strict injunction against speech protected by the First Amendment. The apparent thoroughness of the opinion, addressing a variety of issues that are not in serious dispute, [n1] masks the fact that the majority utterly fails to apply its own definition of a threat, and affirms the verdict and injunction when the evidence in the record does not support a finding that defendants threatened plaintiffs.

After meticulously canvassing the caselaw, the majority correctly distills the following definition of a true threat: "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as *a serious expression of intent to inflict bodily harm* upon that person." Maj. op. at 28a (emphasis added). [n2] The emphasized language is crucial, because it is not illegal–and cannot be made so–merely to say things that would frighten or intimidate the listener. For example, when a doctor says, "You have cancer and will die within six months," it is not a threat, even though you almost certainly will be frightened. Similarly, "Get out of the way of that bus" is not a threat, even though it is said in order to scare you into changing your behavior. By contrast, "If you don't stop performing abortions, I'll kill you" is a true threat and surely illegal.

The difference between a true threat and protected expression is this: A true threat warns of violence or other harm that the speaker controls. Thus, when a doctor tells a patient, "Stop smoking or you'll die of lung cancer," that is not a threat because the doctor obviously can't cause the harm to come about. Similarly, "If you walk in that neighborhood late at night, you're going to get mugged" is not a threat, unless it is clear that the speaker himself (or one of his associates) will be doing the mugging.

In this case, none of the statements on which liability was premised were overtly threatening. On the contrary, the two posters and the web page, by their explicit terms, foreswore the use of violence and advocated lawful means of persuading plaintiffs to stop performing abortions or punishing them for continuing to do so. Nevertheless, because context matters, the statements could reasonably be interpreted as an effort to intimidate plaintiffs into ceasing their abortion-related activities. If that were enough to strip the speech of First Amendment protection, there would be nothing left to decide. But the Supreme Court has told us that "speech does not lose its protected character . . . simply because it may embarrass others *or coerce them into action.*" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (emphasis added). In other words, some forms of intimidation enjoy constitutional protection.

Only a year after *Claiborne Hardware*, we incorporated this principle into our circuit's true threat jurisprudence. Striking down as overbroad a Montana statute that made it a crime to communicate to another "a threat to . . . commit a criminal offense," we stated: "The mere fact that communication induces or 'coerces' action in others does not remove it from first amendment protection." *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir. 1983) (quoting *Claiborne Hardware*, 458 U.S. at 911). We noted–referring to *Claiborne Hardware* again–that the statute criminalized pure speech designed to alter someone else's conduct, so that a "civil rights activist who states to a restaurant owner, 'if you don't desegregate this restaurant I am going to organize a boycott' could be punished for the mere statement, even if no action followed." 719 F.2d at 1442. *Claiborne Hardware* and *Wurtz* hold that statements that are intimidating, even coercive, are protected by the First Amendment, so long as the speaker does not threaten that he, or someone acting in concert with him, will resort to violence if the warning is not heeded.

The majority recognizes that this is the standard it must apply, yet when it undertakes the critical task of canvassing the record for evidence that defendants made a true threat–a task the majority acknowledges we must perform de novo, Maj. op at 19a-20a -its opinion fails to come up with any proof

that defendants communicated an intent to inflict bodily harm upon plaintiffs.

Buried deep within the long opinion is a single paragraph that cites evidence supporting the finding that the two wanted posters prepared by defendants constituted a true threat. Maj. op at 32a; *see also id.* at 39a-41a (same analysis). The majority does not point to any statement by defendants that they intended to inflict bodily harm on plaintiffs, nor is there any evidence that defendants took any steps whatsoever to plan or carry out physical violence against anyone. Rather, the majority relies on the fact that "the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released." *Id.* at 32a; *see also id.* at 39a-41a. But neither Dr. Gunn nor Dr. Patterson was killed by anyone connected with the posters bearing their names. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1134-35 (D. Or. 1999). In fact, Dr. Patterson's murder may have been unrelated to abortion: He was killed in what may have been a robbery attempt five months after his poster was issued; the crime is unsolved and plaintiffs' counsel conceded that no evidence ties his murderer to any anti-abortion group. R.T. at 131, 1197.

preparation of the poster depicting a physician, Dr. Britton, and then murdered him some seven months later. All others who helped to make that poster, as well as those who prepared the other posters, did not resort to violence. And for years, hundreds of other posters circulated, condemning particular doctors with no violence ensuing. *See* R.T. at 1775-76, 1783-84, 2487, 2828. There is therefore no pattern showing that people who prepare wanted-type posters then engage in physical violence. To the extent the posters indicate a pattern, it is that almost all people engaged in poster-making were non-violent. [n3]

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The majority tries to fill this gaping hole in the record by noting that defendants "knew the fear generated among those in the reproductive health services community who were singled out for identification on a 'wanted'-type poster." Maj. op at 32a. But a statement does not become a true threat because it instills fear in the listener; as noted above, many statements generate fear in the listener, yet are not true threats and therefore may not be punished or enjoined consistent with the First Amendment. *See* pp. 53a-54a *supra*. In order for the statement to be a threat, it must send the message that the speakers themselves–or individuals acting in concert with them–will engage in physical violence. The majority's own definition of true threat makes this clear. Yet the opinion points to no evidence that defendants who prepared the posters would have been understood by a reasonable listener as saying that *they* will cause the harm.

Plaintiffs themselves explained that the fear they felt came, not from defendants, but from being singled out for attention by abortion protesters across the country. For example, plaintiff Dr. Elizabeth Newhall testified, "I feel like my risk comes from being identified as a target. And . . . all the John Salvis in the world know who I am, and that's my concern." [n4] *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, No. CV-95-01671-JO*, at 302 (D. Or. Jan. 8, 1999); *see also id.* at 290 ("Up until January of '95, I felt relatively diluted by the–you know, in the pool of providers of abortion services. I didn't feel particularly visible to the people who were–you know, to the John Salvis of the world, you know. I sort of felt one of a big, big group."). Likewise, Dr. Warren Martin Hern, another plaintiff, testified that when he heard he was on the list, "I was terrified. It's hard to describe the feeling that–that you are on a list of people to–who have been brought to public attention in this way. I felt that this was a–a list of doctors to be killed." *Planned Parenthood*, No. CV-95-01671-JO, at 625 (Jan. 11, 1999).

From the point of view of the victims, it makes little difference whether the violence against them will come from the makers of the posters or from unrelated third parties; bullets kill their victims regardless of who pulls the trigger.

But it makes a difference for the purpose of the First Amendment. Speech–especially political speech, as this clearly was–may not be punished or enjoined unless it falls into one of the narrow categories of unprotected speech recognized by the Supreme Court: true threat, *Watts v. United States*, 394 U.S. 705, 707 (1969), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), conspiracy to commit criminal acts, *Scales v. United States*, 367 U.S. 203, 229, 6 L. Ed. 2d 782, 81 S. Ct. 1469 (1961), fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 86 L. Ed. 1031, 62 S. Ct. 766-73 (1942), etc.

Even assuming that one could somehow distill a true threat from the posters themselves, the majority opinion is still fatally defective because it contradicts the central holding of *Claiborne Hardware*: Where the speaker is engaged in public political speech, the public statements themselves cannot be the sole proof that they were true threats, unless the speech directly threatens actual injury to identifiable individuals. Absent such an unmistakable, specific threat, there must be evidence *aside from the political statements themselves* showing that the public speaker would himself or in conspiracy with others inflict unlawful harm. 458 U.S. at 932-34. The majority cites not a scintilla of evidence–other than the posters themselves–that plaintiffs or someone associated with them would carry out the threatened harm.

Given this lack of evidence, the posters can be viewed, at most, as a call to arms for *other* abortion protesters to harm plaintiffs. However, the Supreme Court made it clear that under *Brandenburg*, encouragement or even advocacy of violence is protected by the First Amendment: "Mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Claiborne Hardware*, 458 U.S. at 927 (citing *Brandenburg*, 395 U.S. at 447) (emphasis in the original). [n5] *Claiborne Hardware* in fact goes much farther; it cautions that where liability is premised on "politically motivated" activities, we must "examine critically the basis on which liability was imposed." 458 U.S. at 915. As the Court explained, "Since respondents would impose liability on the basis of a public

address–which predominantly contained highly charged political rhetoric lying at the core of the First Amendment–we approach this suggested basis for liability with extreme care." 458 U.S. at 926-27. This is precisely what the majority does *not* do; were it to do so, it would have no choice but to reverse.

The activities for which the district court held defendants liable were unquestionably of a political nature. There is no allegation that any of the posters in this case disclosed private information improperly obtained. We must therefore assume that the information in the posters was obtained from public sources. All defendants did was reproduce this public information in a format designed to convey a political viewpoint and to achieve political goals. The "Deadly Dozen" posters and the "Nuremberg Files" dossiers were unveiled at political rallies staged for the purpose of protesting *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). Similarly, defendants presented the poster of Dr. Crist at a rally held on the steps of the St. Louis federal courthouse, where the *Dred Scott* decision was handed down, in order to draw a parallel between "blacks being declared property and unborn children being denied their right to live." *Planned Parenthood*, CV-95-01671-JO, at 2677 (Jan. 22, 1999). The Nuremberg Files website is clearly an expression of a political point of view. The posters and the website are designed both to rally political support for the views espoused by defendants, and to intimidate plaintiffs and others like them into desisting abortion-related activities. This political agenda may not be to the liking of many people--political dissidents are often unpopular–but the speech, including the intimidating message, does not constitute a direct threat because there is no evidence other than the speech itself that the speakers intend to resort to physical violence if their threat is not heeded.

In determining whether the record here supports a finding of true threats, not only the reasoning but also the facts of *Claiborne Hardware* are highly relevant. *Claiborne Hardware* arose out of a seven-year effort (1966 to 1972) to obtain racial justice in Claiborne County, Mississippi. *Claiborne Hardware*, 458 U.S. at 898. The campaign

employed a variety of tactics, one among them being the boycotting of white merchants. *Id.* at 900. The boycott and other concerted activities were organized by the NAACP, in the person of its Mississippi field secretary Charles Evers, as well as by other black organizations and leaders. *Id.* at 898-900.

In order to persuade or coerce recalcitrant blacks to join the boycott, the organizers resorted to a variety of enforcement mechanisms. These included the posting of store watchers outside the boycotted stores. These watchers, also known as "Black Hats" or "Deacons," would "identify those who traded with the merchants." *Id.* at 903. [n6] The names were collected and "read aloud at meetings at the First Baptist Church and published in a local black newspaper." *Id.* at 909. Evers made several speeches containing threats–including those of physical violence–against the boycott violators. *Id.* at 900 n.28, 902, 926-27. In addition, a number of violent acts–including shots fired at individuals' homes–were committed against the boycott breakers. *Id.* at 904-06.

The lawsuit that culminated in the *Claiborne Hardware* opinion was brought against scores of individuals and several organizations, including the NAACP. The state trial court found defendants liable in damages and entered "a broad permanent injunction," which prohibited the defendants from engaging in virtually all activities associated with the boycott, including picketing and using store watchers. *Id.* at 893. The Mississippi Supreme Court affirmed, finding liability based on a variety of state law theories, some of which had as their gravamen the use of force or threat of force by those engaged in the boycott. *Id.* at 894-95.

The United States Supreme Court began its opinion in *Claiborne Hardware* by noting that "the term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies" and that "certain joint activities have a 'chameleon-like' character." *Id.* at 888. The Claiborne County boycott, the Court noted, "had such a character; it included elements of criminality and elements of majesty." *Id.* The Court concluded that the state courts had erred in ascribing to all boycott organizers illegal acts–

including violence and threats of violence–of some of the activists. The fact that certain activists engaged in such unlawful conduct, the Court held, could not be attributed to the other boycott organizers, unless it could be shown that the latter had personally committed or authorized the unlawful acts. *Id.* at 932-34.

In the portion of *Claiborne Hardware* that is most relevant to our case, *id.* at 927-32, the Court dealt with the liability of the NAACP as a result of certain speeches made by Charles Evers. In these speeches, Evers seemed to threaten physical violence against blacks who refused to abide by the boycott, saying that:

- the boycott organizers knew the identity of those members of the black community who violated the boycott, *id.* at 900 n.28;
- discipline would be taken against the violators, *id.* at 902, 927;
- "if we catch any of you going in any of them racist stores, we're gonna break your damn neck," *id.* at 902;
- "the Sheriff could not sleep with boycott violators at night" in order to protect them, *id.*;
- "blacks who traded with white merchants would be answerable to him," *id.* at 900 n.28 (emphasis in the original).

These statements, the Supreme Court recognized," might have been understood as inviting an unlawful form of discipline or, at least, *as intending to create a fear of violence whether or not improper discipline was specifically intended.*" *Id.* at 927 (emphasis added). Noting that such statements might not be constitutionally protected, the Court proceeded to consider various exceptions to the rule that speech may not be prohibited or punished.

The Court concluded that the statements in question were not "fighting words" under the rule of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942); nor were they likely to cause an immediate panic, under the rule of *Schenck v. United States*, 249 U.S. 47, 52, 63 L. Ed. 470, 39 S. Ct. 247, 17 Ohio L. Rep. 149 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."). 458 U.S. at 927. Nor was the speech in question an incitement under *Brandenburg v. Ohio*, 395 U.S. 444 (1969), because it resulted in no immediate harm to anyone. 458 U.S. at 927-28. The Court also cited, and found inapplicable, its one case that had held "true threats" were not constitutionally protected, *Watts v. United States*, 394 U.S. 705, 705 (1969). 458 U.S. at 928 n.71. The mere fact that the statements could be understood "as intending to create a fear of violence," 458 U.S. at 927, was insufficient to make them "true threats" under *Watts*.

The Court then considered the theory that the speeches themselves–which suggested violence against boycott violators–might constitute authorization or encouragement of unlawful activity, but flatly rejected it. 458 U.S. at 929. The Court noted that the statements were part of the "emotionally charged rhetoric of Charles Evers' speeches," and therefore could not be viewed as authorizing lawless action, even if they literally did so: "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." 458 U.S. at 928. Absent "evidence–apart from the speeches themselves–that Evers authorized . . . violence" against the boycott breakers, neither he nor the NAACP could be held liable for, or enjoined from, speaking. 458 U.S. at 929. In other words, even when public speech sounds menacing, even when it *expressly* calls for violence, it cannot form the basis of liability unless it amounts to incitement or directly threatens actual injury to particular individuals.

While set in a different time and place, and involving a very different political cause, *Claiborne Hardware* bears remarkable similarities to our case:

- Like *Claiborne Hardware*, this case involves a concerted effort by a variety of groups and individuals in pursuit of a common political cause. Some of the activities were lawful, others were not. In both cases, there was evidence that the various players communicated with each other and, at times, engaged in concerted action. The Supreme Court, however, held that mere association with groups or individuals who pursue unlawful conduct is an insufficient basis for the imposition of liability, unless it is shown that the defendants actually participated in or authorized the illegal conduct.

- Both here and in *Claiborne Hardware*, there were instances of actual violence that followed heated rhetoric. The Court made clear, however, that unless the violence follows promptly after the speeches, thus meeting the stringent Brandenburg standard for incitement, no liability could be imposed on account of the speech.

- The statements on which liability was premised in both cases were made during the course of political rallies and had a coercive effect on the intended targets. Yet the Supreme Court held in *Claiborne Hardware* that coercion alone could not serve as the basis for liability, because it had not been shown–by evidence aside from the political speeches themselves–that defendants or their agents were involved in or authorized actual violence.

- In *Claiborne Hardware*, the boycott organizers gathered facts–the identity of those who violated

> the boycott–and publicized them to the community by way of speeches and a newspaper. As in our case, this ostentatious gathering of information, and publication thereof, were intended to put pressure on those whose names were publicized, and perhaps put them in fear that they will become objects of violence by members of the community. Yet the Supreme Court held that this could not form the basis for liability.

To the extent *Claiborne Hardware* differs from our case, the difference makes ours a far weaker case for the imposition of liability. To begin with, Charles Evers's speeches in *Claiborne Hardware* explicitly threatened physical violence. Referring to the boycott violators, Evers repeatedly went so far as to say that "we," presumably including himself, would "break your damn neck." 458 U.S. at 902. In our case, the defendants never called for violence at all, and certainly said nothing suggesting that they personally would be involved in any violence against the plaintiffs.

Another difference between the two cases is that the record in *Claiborne Hardware* showed a concerted action between the boycott organizers, all of whom operated within close physical proximity in a small Mississippi county. By contrast, there is virtually no evidence that defendants had engaged in any concerted action with any of the other individuals who prepared "wanted" posters in the past. [n7]

The most striking difference between the two cases is that one of Evers's speeches in *Claiborne Hardware*, which expressly threatened violence against the boycott violators, was in fact followed by violence; he then made additional speeches, again referring to violence against boycott breakers. 458 U.S. at 900 (April 1966 speech), 902 (April 1969 speeches). [n8] By contrast, the record here contains no evidence that violence was committed against any doctor after his name appeared on defendants' posters or web page.[n9]

The opinion's effort to distinguish *Claiborne Hardware* does not bear scrutiny. The majority claims that in *Claiborne Hardware*, "there was no context to give the speeches

(including the expression 'break your neck') the implication of . . . directly threatening unlawful conduct." Maj. op. at 24a-25a. As explained above, the majority is quite wrong on this point, *see* pp. 8a-9a *supra*, but it doesn't matter anyway: Evers's statements were threatening on their face. Not only did he speak of breaking necks and inflicting "discipline," he used the first person plural "we" to indicate that he himself and those associated with him would be doing the neck-breaking, 458 U.S. at 902, and he said that "blacks who traded with white merchants would be *answerable to him*," *id.* at 900 n.28 (emphasis in the original).

It is possible–as the majority suggests–that Evers's statements were "hyperbolic vernacular," Maj. op. at 25a, [n10] but the trier of fact in that case found otherwise. The Supreme Court nevertheless held that the statements ought to be treated as hyperbole because of their political content. By any measure, the statements in our case are far less threatening on their face, yet the majority chooses to defer to the jury's determination that they were true threats.

The majority also relies on the fact that the posters here "were publicly distributed, but personally targeted." Maj. op. at 40a. But the threats in *Claiborne Hardware* were also individually targeted. Store watchers carefully noted the names of blacks who entered the boycotted stores, and those names were published in a newspaper and read out loud at the First Baptist Church, where Evers delivered his speeches. 458 U.S. at 903-04. When speaking of broken necks and other discipline, Evers was quite obviously referring to those individuals who had been identified as defying the boycott; in fact, he stated explicitly that he knew their identity and that they would be answerable to him. *Id.* at 900 n.28. The majority's opinion simply cannot be squared with *Claiborne Hardware.*

Claiborne Hardware ultimately stands for the proposition that those who would punish or deter protected speech must make a very substantial showing that the speech stands outside the umbrella of the First Amendment. This message was reinforced recently by the Supreme Court in *Ashcroft v. Free Speech Coalition*, 152 L. Ed. 2d 403, 122 S.

Ct. 1389, 2002 WL 552476 (U.S. Apr. 16, 2002), where the government sought to prohibit simulated child pornography without satisfying the stringent requirements of *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). The Court rejected this effort, even though the government had earnestly argued that suppression of the speech would advance vital legitimate governmental interests, such as avoiding the exploitation of real children and punishing producers of real child pornography. *See* 152 L. Ed. 2d 403, id. at *11-*13; see also 152 L. Ed. 2d 403, id. at *16 (Thomas, J., concurring in the judgment); 152 L. Ed. 2d 403, id. at *17-*18 (O'Connor, J., concurring in the judgment in part and dissenting in part); 152 L. Ed. 2d 403, id. at *21 (Rehnquist, C. J., dissenting). The Court held that the connection between the protected speech and the harms in question is simply too "contingent and indirect" to warrant suppression. 152 L. Ed. 2d 403, Id. at *10; see also 152 L. Ed. 2d 403, id. at *12 ("The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."). As Judge Berzon notes in her inspired dissent, defendants' speech, on its face, is political speech on an issue that is at the cutting edge of moral and political debate in our society, *see* Berzon Dissent at 75a-76a, and political speech lies far closer to the core of the First Amendment than does simulated child pornography. "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Free Speech Coalition*, 152 L. Ed. 2d 403, 2002 WL 552476, at *12. If political speech is to be deterred or punished, the rationale of *Free Speech Coalition* requires a far more robust and direct connection to unlawful conduct than these plaintiffs have offered or the majority has managed to demonstrate. The evidence that, despite their explicitly non-threatening language, the Deadly Dozen poster and the Nuremberg Files website were true threats is too "contingent and indirect" to satisfy the standard of *Free Speech Coalition*.

The cases on which the majority relies do not support its conclusion. *United States v. Hart*, 212 F.3d 1067 (8th Cir. 2000), is a case where the communication did not merely

threaten harm in the future, but was itself perceived as dangerous. The defendant there parked two Ryder trucks in the driveway of an abortion clinic, as close to the building as possible. *Hart*, 212 F.3d at 1069, 1072. Given the association of Ryder trucks with the Oklahoma City bombing, and the timing and location of the incident, the trucks could reasonably be suspected of containing explosives. They were much like mailing a parcel containing a ticking clock or an envelope leaking white powder. The threat in *Hart* came not from the message itself, but from the potentially dangerous medium used to deliver it.

To make *Hart* even remotely analogous to our case, the defendant there would have had to be picketing abortion clinics with a placard depicting a Ryder truck. We know that the Eighth Circuit would not have permitted the imposition of liability in that situation because of the careful manner in which it circumscribed its holding. The court noted that the trucks were parked in a driveway of the abortion clinic, near the entrance, rather than on the street, and that the incident was timed to coincide with a visit by the President to the area, which heightened security concerns. *Id.* at 1072. In light of these facts, a reasonable person could believe that the trucks might be filled with explosives, which would not have been the case, had defendant merely carried a placard with a picture of a Ryder truck. In our case, the defendants merely displayed posters at locations nowhere near the plaintiffs' homes or workplaces. The threat, if any there was, came not from the posters themselves, but from the effect they would have in rousing others to take up arms against the plaintiffs. *Hart* has no relevance whatsoever to our case.

Nor does *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), a case involving repeated face-to-face confrontations between the defendant and the targets of her harangues, help the majority. Dinwiddie, a pro-life activist, stood outside Dr. Crist's abortion clinic and shouted various threats through a bullhorn, making it clear that she herself intended to carry them out. As Dinwiddie told one of Dr. Crist's co-workers: "You have not seen violence yet until you see what *we* do to you." *Id.* at 925 (emphasis added). Where the speaker directly confronts her target and expressly states

that she is among those who will carry out the violence, it is hardly surprising when the court finds that there has been a true threat. [n11] We have recognized that statements communicated directly to the target are much more likely to be true threats than those, as here, communicated as part of a public protest. Our caselaw also instructs that, in deciding whether the coercive speech is protected, it makes a big difference whether it is contained in a private communication–a face-to-face confrontation, a telephone call, a dead fish wrapped in newspaper [n12]–or is made during the course of public discourse. The reason for this distinction is obvious: Private speech is aimed only at its target. Public speech, by contrast, seeks to move public opinion and to encourage those of like mind. Coercive speech that is part of public discourse enjoys far greater protection than identical speech made in a purely private context. We stated this clearly in *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214 (9th Cir. 1990), where, relying on *Brandenburg*, *Claiborne Hardware* and *Wurtz*, we allowed" public speeches advocating violence" substantially more leeway under the First Amendment than "privately communicated threats." *McCalden*, 955 F.2d at 1222. [n13]

We reaffirmed the importance of the public-private distinction in *Melugin v. Hames*, 38 F.3d 1478 (9th Cir. 1994). Finding a death threat communicated to a magistrate judge by mail to be a "true threat," we expressly distinguished between "the 'threat' in *Watts* against President Johnson [which] was made during a public political rally opposing the Vietnam War" and defendant's threats, which "were directed in a *private* communication to a state judicial officer with the intent to obtain an immediate jury trial." *Id.* at 1484 (footnote omitted) (emphasis added).

In *Bauer v. Sampson*, 261 F.3d 775 (9th Cir. 2001), two members of today's majority emphasized the importance of the public character of speech in deciding whether it constitutes a "true threat." *Bauer* involved a college professor who published an underground campus newsletter containing threatening criticism of the college's board of trustees. [n14] Noting that "expression involving a matter of public concern enjoys robust First Amendment protection," the opinion

states that "although [the] writings have some violent content," the fact that they were made "in an underground campus newspaper in the broader context of especially contentious campus politics" rendered them a "hyperbole" and not a "true threat." *Id.* at 783-84. [n15] The majority seems perfectly willing to have this court treat expressly violent statements by Charles Evers and Roy Bauer as hyperbole, but to hold the entirely *nonviolent* statements by defendants to be true threats.

Finally, a word about the remedy. The majority affirms a crushing liability verdict, including the award of punitive damages, in addition to the injunction. [n16] An injunction against political speech is bad enough, but the liability verdict will have a far more chilling effect. Defendants will be destroyed financially by a huge debt that is almost certainly not dischargeable in bankruptcy; it will haunt them for the rest of their lives and prevent them from ever again becoming financially self-sufficient. The Supreme Court long ago recognized that the fear of financial ruin can have a seriously chilling effect on all manner of speech, and will surely cause other speakers to hesitate, lest they find themselves at the mercy of a local jury. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277-79, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). The lesson of what a local jury has done to defendants here will not be lost on others who would engage in heated political rhetoric in a wide variety of causes.

In that regard, a retrospective liability verdict is far more damaging than an injunction; the latter at least gives notice of what is prohibited and what is not. The fear of liability for damages, and especially punitive damages, puts the speaker at risk as to what a jury might later decide is a true threat, and how vindictive it might feel towards the speaker and his cause. In this case, defendants said nothing remotely threatening, yet they find themselves crucified financially. Who knows what other neutral statements a jury might imbue with a menacing meaning based on the activities of unrelated parties. In such circumstances, it is especially important for an appellate court to perform its constitutional function of reviewing the record to ensure that the speech in question clearly falls into one of the narrow categories that is

unprotected by the First Amendment. The majority fails to do this.

While today it is abortion protesters who are singled out for punitive treatment, the precedent set by this court–the broad and uncritical deference to the judgment of a jury–will haunt dissidents of all political stripes for many years to come. Because this is contrary to the principles of the First Amendment as explicated by the Supreme Court in *Claiborne Hardware* and its long-standing jurisprudence stemming from *Brandenburg v. Ohio*, I respectfully dissent.

Footnotes

n1 For example, it is clear that context may be taken into account in determining whether something is a true threat, an issue to which the majority devotes 16 pages. See Maj. op. at 19a-26a, 29a-33a. Nor is there a dispute that someone may be punished for uttering threats, even though he has no intent to carry them out, *see id.* at 26a-27a, or that we defer to the factfinder on questions of historical fact in First Amendment cases, *id.* at 14a-15a.

n2 Although the majority's definition does not specify *who* is to inflict the threatened harm, use of the active verb "inflict" rather than a passive phrase, such as "will be harmed," strongly suggests that the speaker must indicate he will take an active role in the inflicting. Recent academic commentary supports the view that this requirement is an integral component of a "true threat" analysis. *See* Steven G. Gey, The Nuremberg Files and the First Amendment Value of Threats, 78 Tex. L. Rev. 541, 590 (2000) (part of what "separates constitutionally unprotected true threats from constitutionally protected *Claiborne Hardware*-style political intimidation is [that] the speaker communicates the intent to carry out the threat personally or to cause it to be carried out"); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 289 (2001) ("determining what is a true threat [should] require[]proof that the speaker explicitly or implicitly suggest that he or his co-conspirators will be the ones to carry out the threat").

n3 The majority so much as admits that the Nuremberg

Files website does not constitute a threat because of the large number of people listed there. Maj. op. at 32a-33a. The majority does point out that doctors were listed separately, and that the names of doctors who were killed or wounded were stricken or greyed out, *id.* at 32a-33a, but does not explain how this supports the inference that the posting of the website in any way indicated that *defendants* intended to inflict bodily harm on plaintiffs. At most, the greying out and strikeouts could be seen as public approval of those actions, and approval of past violence by others cannot be made illegal consistent with the First Amendment. *See Hess v. Indiana*, 414 U.S. 105, 108-09 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 237, 9 L. Ed. 2d 697, 83 S. Ct. 680-38 (1963); *Noto v. United States*, 367 U.S. 290, 297, 6 L. Ed. 2d 836, 81 S. Ct. 1517-99 (1961).

n4 In December 1994, John Salvi killed two clinic workers and wounded five others in attacks on two clinics in Brookline, Massachusetts; Salvi later fired shots at a clinic in Norfolk, Virginia before he was apprehended. *See Planned Parenthood*, 41 F. Supp. 2d at 1135-36. Salvi is not a defendant in this case and, as far as the record reveals, was not engaged in the preparation of any posters.

n5 Under *Brandenburg*, advocacy can be made illegal if it amounts to incitement. But incitement requires an immediacy of action that simply does not exist here, which is doubtless why plaintiffs did not premise their claims on an incitement theory.

n6 It would appear that in the small Mississippi community in Claiborne County, black residents knew each other on sight.

n7 The closest connection the district court could find between defendants and any of these individuals was a visit paid by two defendants, Andrew Burnett and Catherine Ramey, to John Burt, a maker of such posters. At that meeting, they "discussed 'wanted' posters." *Planned Parenthood*, 41 F. Supp. 2d at 1135. The district court did not find that defendants participated in the preparation of Burt's

posters, nor that they otherwise engaged in concerted activities with other abortion protesters.

n8 On April 1, 1966, Evers made a speech "directed to all 8,000-plus black residents of Claiborne County," where he said that "blacks who traded with white merchants would be *answerable to him*" and that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Claiborne Hardware*, 458 U.S. at 900 n.28 (emphasis in the original). Later that year, violence was, indeed, committed against blacks who refused to join the boycott. *Id.* at 928. In April 1969, Evers reiterated his message in two other speeches, saying that "boycott violators would be 'disciplined' by their own people" and that "'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.'" *Id.* at 902.

n9 The majority mentions that "one of the . . . doctors on the Deadly Dozen poster had in fact been shot before the poster was published." Maj. op. at 40a. The physician in question, Dr. Tiller, was shot and wounded in August 1993, a year and a half before the Deadly Dozen poster was unveiled. *Planned Parenthood*, 41 F. Supp. 2d at 1131-32, 1135. The majority does not explain how including Dr. Tiller's name on the Deadly Dozen poster contributed to the poster's threatening message. To the extent it is relevant at all, inclusion of Dr. Tiller's name cuts the other way because it goes counter to the supposed pattern that the majority is at such pains to establish, namely that listing of a name on a poster was followed by violence against that person. As to Dr. Tiller, that order is obviously reversed.

n10 In support of this claim, the majority states that there was no "indication that Evers's listeners took his statement that boycott breakers' 'necks would be broken' as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores." Maj. op. at 25a. The majority extrapolates this conclusion from only four out of ten incidents of boycott-related violence cited in *Claiborne Hardware*. *See* 458 U.S. at 904-06. Although these were the four incidents about which the most information was available–perhaps because these four particular victims were

not afraid to lodge a complaint or to come forward and testify–they alone are hardly sufficient to support a conclusion that Evers's audience largely ignored his warnings.

n11 Even then, *Dinwiddie* is instructive for the restraint it exercised in granting relief. Dinwiddie was not subjected to a crushing and punitive award of damages, and the injunction against her was narrowly drawn and carefully tailored to accommodate her legitimate interests, including her interest in free expression. She was not banned from all speech of a certain kind, but only from speech that expressly violates the Freedom of Access to Clinic Entrances Act or is delivered through a bullhorn within 500 feet of an abortion clinic. *Dinwiddie*, 76 F.3d at 928-29. The Eighth Circuit emphasized that "the types of activity that the injunction would proscribe are quite narrow," and that Dinwiddie would be free to "carry signs, distribute literature, and speak at a reasonable volume even when she is within 500 feet of an abortion clinic." *Id.* By contrast, the injunction in our case indefinitely bars defendants from publishing, reproducing, distributing (and even owning) the posters, the website or anything similar, anywhere in the United States. *Planned Parenthood*, 41 F. Supp. 2d at 1155-56.

n12 *See The Godfather* (Paramount Pictures 1972).

n13 In my dissent from the failure to take *McCalden* en banc, I argued that this distinction was inapposite in *McCalden* because the statement involved–a warning by Holocaust survivors that they will disrupt an exhibit by a Holocaust revisionist with a demonstration–could not be characterized as a threat, even if communicated in private. *McCalden*, 955 F.2d at 1229 (Kozinski, J., dissenting from denial of rehearing en banc). I did not, of course, disagree with *McCalden's* holding that public statements are entitled to more protection than private ones.

n14 These writings included a reference to a "two-ton slate of polished granite" that defendant "hoped to drop "on the college president; a comment that "no decent person could resist the urge to go postal" at a meeting of the board; a fantasy description of a funeral for one of the trustees; and

creating "a satisfying acronym: MAIM" from the college president's name. *Bauer*, 261 F.3d at 780.

n15 In fact, *no* prior case in our circuit has ever found statements charged with political content and delivered in a public arena to be true threats. See, in addition to the cases already cited, *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996) (finding a" true threat" where a student directly threatened to kill the school counselor in her own office); *United States v. Gordon*, 974 F.2d 1110 (9th Cir. 1992) (imposing liability where defendant entered former President Reagan's house and, when apprehended, repeatedly asserted his wish to kill the President); *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990) (holding that defendant's statements to an INS agent, delivered face-to-face and by phone, that the agent "will pay" for defendant's arrest, were "true threats"); *United States v. Gilbert*, 884 F.2d 454 (9th Cir. 1989) (finding a true "threat" where a white supremacist mailed a threatening letter and several posters directly to the founder of an adoption agency that placed minority children with white families); *United States v. Mitchell*, 812 F.2d 1250 (9th Cir. 1987) (finding a "true threat" where defendant, when questioned by customs officials and Secret Service agents in isolation, repeatedly-threatened to kill President Reagan); *United States v. Merrill*, 746 F.2d 458, 460 (9th Cir. 1984) (finding a "true threat" where defendant mailed to several individuals "letters [with] macabre and bloody depictions of President Reagan along with the words 'Kill Reagan' "); *Roy v. United States*, 416 F.2d 874, 876 & n.6 (9th Cir. 1969) (finding that a statement by a marine to the telephone operator that he is "going to get" arriving President Johnson constitutes a threat, but suggesting that its decision could have been different if the "words were stated in a political . . . context").

n16 Although the majority remands the award of punitive damages, such award is affirmed unless grossly disproportionate. *See In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir. 2001).

BERZON, Circuit Judge, with whom REINHARDT, KOZINSKI, and KLEINFELD, Circuit Judges, join, and O'SCANNLAIN, Circuit Judge, joins as to Part III only, dissenting:

This case is proof positive that hard cases make bad law, and that when the case is *very* hard – meaning that competing legal and moral imperatives pull with impressive strength in opposite directions – there is the distinct danger of making *very* bad law.

The majority opinion in this case suitably struggles with the difficult First Amendment issues before us concerning whether the posters and website at issue are or are not First Amendment protected speech. The legal standard the majority applies, however, is, in my view, insufficiently cognizant of underlying First Amendment values, for reasons that are largely explained in Judge Kozinski's dissent, and for additional reasons that I develop below.

Moreover, the majority, in an offhand way, also decides two evidentiary issues that, I can say with some confidence, would not be decided so summarily, and would probably not be decided in the same way, were this a less wrenching case on its facts. Keeping one's eyes on the broader picture is not always easy when people's lives – in this case the lives of medical professionals – are being severely disrupted because they are performing constitutionally protected activities in a perfectly lawful manner at the behest of people who want their services and are entitled to have them. As judges, though, we need to recognize that we are *not writing* for this day and place only, and that rulings that appear peripheral in the present context will take on great significance as applied in another.

I

The First Amendment and True Threats

1. *Clarifying the issue*: The reason this is a hard First Amendment case becomes somewhat obscured in all the factual detail and quotation of precedent that we as judges engage in. The essential problem – one that, as far as I am aware, is unique in the plethora of "threat" cases and perhaps

more generally in First Amendment jurisprudence – is that the speech for which the defendants are being held liable in damages and are enjoined from reiterating in the future is, on its face, clearly, indubitably, and quintessentially the kind of communication that is fully protected by the First Amendment.

The point is not simply that the two posters and the Nuremberg files contain no *explicit* threats that take them outside the free speech umbrella. We are not talking simply about ambiguous or implicit threats that depend on context for their meaning, such as the Ryder trucks in *United States v. Hart*, 212 F.3d 1067 (8th Cir. 2000). Rather, the pivotal issue for me is that what the communications in this case do contain has all the attributes that numerous cases and commentators have identified as core factors underlying the special protection accorded communication under our Constitution.

The posters and website are all public presentations on a matter of current moral and political importance; they provide information to the public on that matter and propose a – peaceful, legal – course of action; and they were presented with explicit reference to great moral and political controversies of the past. Cases that are a virtual First Amendment "greatest hits" establish that these kinds of expressions – those that provide information to the public (particularly when directed at publicly-available media), publish opinions on matters of public controversy, and urge others to action – are the kinds of speech central to our speech-protective regime, and remain so even when the message conveyed is, in substance, form, or both, anathema to some or all of the intended audience. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 74, 13 L. Ed. 2d 125, 85 S. Ct. 209-75 (1964) ("Speech concerning public affairs is more than self-expression; it is the essence of self-government."); *Roth v. United States*, 354 U.S. 476, 484, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, 14 Ohio Op. 2d 331 (1957) (The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (The First Amendment "attempts to secure the widest

possible dissemination of information from diverse and antagonistic sources."); *Id.* at 271 ("The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered."); *Thornhill v. Alabama*, 310 U.S. 88, 102, 84 L. Ed. 1093, 60 S. Ct. 736 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."); *Thomas v. Collins*, 323 U.S. 516, 537, 89 L. Ed. 430, 65 S. Ct. 315 (1945) ("'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (Speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.").

Tested against these most basic premises, there can be no doubt that the documents upon which the damages judgment and injunction in this case were based were, on their face, "expressions of grievance and protest on one of the major public issues of our time," and, as such, documents that "would seem clearly to qualify for . . . constitutional protection." *New York Times*, 376 U.S. at 271. The posters and website could not and would not have been proscribed, as "true threats" or otherwise, had there been no (1) history of similar – although not at all identical – publications put out by other people that were followed by murders – by other people, not members of either of the two defendant organizations – of health professionals who performed abortions; and (2) repeated advocacy by these defendants of the proposition that violence against abortion providers can be morally justified, advocacy that all concede was, standing alone, itself protected by the First Amendment. *See Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) ("The mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such

action.") (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)). [n1] The precise question before us is therefore whether that context is sufficient to turn a set of communications that contain speech at the core of the First Amendment's protections into speech that can be proscribed pursuant to an injunction and compensated for through damages.

2. *An analogy*: Stated in those terms, the issue bears a close resemblance to that faced by the courts with regard to First Amendment limitations on defamation actions, beginning with *New York Times Co. v. Sullivan*. Like "true threats," false speech has long been understood as a category of communication that contains few of the attributes that trigger constitutional speech protection and so great a likelihood of harming others that we refer to the speech as being beyond the protection of the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992). Like "true threats," false, defamatory speech can severely disrupt peoples' lives, both by affecting them emotionally (as does apprehension of danger) and by impairing their social ties, their professional activities, and their ability to earn a living (as does the perceived need to protect oneself from physical harm).

The Supreme Court since the 1960s has developed a set of discrete principles designed *not* to provide false speech with constitutional protection, but to erect, on an ascending scale depending upon the perceived value of the particular kind of speech to the common dialogue that the First Amendment is designed to foster, doctrinal protections within defamation law that minimize self-censorship of truthful speech. Those protections are based upon realistic assessment of the vagaries of litigation and the fear of crippling damages liability. [n2]

For example, *New York Times* observed that "allowance of the defense of truth . . . does not mean that only false speech will be deterred," because "under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." 376

U.S. at 279; *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974) ("To assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise . . . this Court has extended a measure of strategic protection to defamatory falsehood.") (internal citation omitted). Without a federal constitutional requirement focusing on the speaker's state of mind with regard to the truth of what he was saying (as well as careful scrutiny by the courts of any jury verdict based purely upon speech), the Court concluded, there would be a distinct danger that fear of defamation liability would "dampen[]the vigor and limit[]the variety of public debate," to the detriment of First Amendment values. *Id.* The problem has been treated as one of balancing the very real injury caused by unwarranted damage to reputation against the dangers to the system of free expression worked by rules of liability that are easy to misperceive or to misapply in particular instances. And the Court's answer to this problem has, as noted, been far from unitary. Instead, the balance has been struck with regard to subcategories of defamation cases, according to the nature of the communication, the nature of the parties and, to some degree, the purpose of the speech. [n3]

Our problem here is similar. Any "true threats" within the three communications at issue were encased in documents and public events that promoted – at least for those listeners not "in the know" – precisely the kind of "debate on public issues [that] should be uninhibited, robust, and wide-open, and that . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . . ." *New York Times*, 376 U.S. at 270. True, the targeted medical professionals and clinics were not public officials, but they were engaged in activities that the defendants, rightly or wrongly, regarded as both morally reprehensible and a matter for eventual governmental proscription through the political process (presumably through a constitutional amendment). Moreover, as both the majority and Judge Kozinski recognize, the posters and website remained core First Amendment speech even though – quite aside from any coded threat of physical harm – they exposed the targeted plaintiffs to other, nonviolent but still extremely disturbing, interference with

their daily lives (in the form of unwanted public exposure and inflammatory rhetoric directed at them, their families, and their customers, both at home and at work) and even if they induced fear in the plaintiffs that people *unconnected with the defendants* might harm them. [n4]

Under these circumstances, the question for me becomes devising standards that, like the constitutional defamation standards that vary with the strength of the protection of the communication, rely not on an unitary "true threats" standard, as does the majority, but on considerations that lessen the danger of mistaken court verdicts and resulting self-censorship to a greater or lesser degree depending upon the nature of the speech in question and the role of speech of that nature in the scheme of the First Amendment. [n5]

3. *Some constitutional parameters*: Judge Kozinski, in his dissent, makes one important suggestion toward this end with which, for all the reasons already canvassed, I fully agree: He suggests that "statements communicated directly to the target are much more likely to be true threats than those, as here, communicated as part of a public protest." Kozinski dissent at 66a. As a first cut at separating out the kinds of allegedly threatening communications that are central to First Amendment values and therefore must be tested by particularly stringent criteria before they can be prohibited, these two criteria – the public nature of the presentation and content addressing a public issue (which can include matters of social or economic as well as political import for the individuals involved, see *Bartnicki v. Vopper*, 532 U.S. 514, 535, 149 L. Ed. 2d 787, 121 S. Ct. 1753 (2001); *Thornhill*, 310 U.S. at 102-03) – are critical.

In a rare instance, a threat uttered in the course of a public political protest might conceivably exceed the bounds of protected speech. *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976), is illustrative. (I am not aware of any case in this circuit in which a defendant was, as in *Kelner*, punished or held liable for a threat uttered in the course of public protest activity – a gap in itself telling with regard to the importance and novelty of this case.) In *Kelner*, a member of the Jewish Defense League stated at a press conference held

in New York just before Yassir Arafat was scheduled to be in the city that "We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive . . . . We are planning to assassinate Mr. Arafat . . . . Everything is planned in detail . . . . It's going to come off." *Id.* at 1021. The press conference was broadcast on television that evening. [n6] *Id.* The Second Circuit upheld the defendant's conviction for uttering the threat, over the objection that the speech was simply an extreme statement of opposition to Mr. Arafat, protected under the First Amendment as hyperbolic public discussion of a public issue. *Id.* at 1024-28.

In doing so, the Second Circuit recognized that where the asserted threat "is made in the midst of what may be other protected political expression," courts must be vigilant to permit liability or conviction only in circumstances in which the danger to free expression is minimal; where that is the case, "the threat itself may affront such important social interests that it is punishable." *Id.* at 1027. The criteria the Second Circuit suggested to police the dividing line were that "the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *Id.* Measured against these criteria, *Kelner* held that, although politically motivated and designed to convey a public position of protest to Mr. Arafat's policies, the speech in question was not protected speech. *Id.* at 1028.

Kelner's criteria for adjudging the protection accorded alleged threats uttered in the course of public communications on public issues seem appropriate to me – and, as I show below, consistent with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) – with one exception, an addition, and some explication:

First, the exception: I would not include the imminence or immediacy of the threatened action as a prerequisite to finding a true threat delivered as part of a public speech, if all of the other factors were present. The immediacy requirement calls to mind the standard the Supreme Court

erected for proscription of inciting speech in *Brandenburg*. But as the majority can be read to recognize and as Judge Kozinski well explains, the separate constitutional category of unprotected speech for threats does not include statements that induce fear of violence by third parties.

Where there is no threat, explicit or implicit, that the speaker or someone under his or her control intends to harm someone, a statement inducing fear of physical harm must be either (1) a prediction or warning of injury, or (2) an inducement or encouragement of someone else to cause the injury. The former is, as Judge Kozinski suggests, clearly entitled to protection under the First Amendment as either informative or persuasive speech. The latter kind of statement may or may not be protected. Whether it is or not must be governed by the strict inducement standard of *Brandenburg* if the more than fifty years of contentious development of the protection of advocacy of illegal action is not to be for naught. *See Brandenburg*, 395 U.S. at 447-48 (overruling *Whitney v. California*, 274 U.S. 357, 71 L. Ed. 1095, 47 S. Ct. 641 (1927), and holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *see also* 395 U.S. at 450-454 (Douglas, J., concurring) (recounting the history of the "clear and present danger" doctrine for adjudging the constitutionality of restrictions upon advocacy of illegal action).

One can, however, justify a somewhat different standard for judging the constitutionality of a restriction upon threats than for a restriction upon inducement of violence or other illegal action. There is a difference for speech-protective purposes between a statement that one oneself intends to do something and a statement encouraging or advocating that someone else do it. The latter will result in harmful action only if someone else is persuaded by the advocacy. If there is adequate time for that person to reflect, any harm will be due to another's considered act. The speech itself, in that circumstance, does not create the injury, although it may make it more likely. The Supreme Court has essentially

decided that free expression would be too greatly burdened by anticipatory squelching of advocacy which can work harm only indirectly if at all. *See Kelner*, 534 F.2d at 1027 n.9 ("Short of [advocacy that is close, direct, effective and instantaneous in its impact] the community must satisfy itself with punishment of the one who committed the violation of law or attempted to do so, not punishment of the person who communicated with him about it.") (quoting Thomas Emerson, *The System of Freedom of Expression* 404-05 (1970)); *see also Ashcroft v. Free Speech Coalition*, 152 L. Ed. 2d 403, 122 S. Ct. 1389, 1403 (2002) (because "the Court's First Amendment cases draw vital distinctions between words and deeds," the government may not punish speech because it increases the chance that someone other than the speaker will commit an unlawful act).

A true threat, in contrast, implies a firmness of purpose by the person speaking, not mediated through anyone else's rational or emotional reaction to the speech. Threatening speech thereby works directly the harms of apprehension and disruption, whether the apparent resolve proves bluster or not and whether the injury is threatened to be immediate or delayed. Further, the social costs of a threat can be heightened rather than dissipated if the threatened injury is promised for some fairly ascertainable time in the future – the "specific" prong – for then the apprehension and disruption directly caused by the threat will continue for a longer rather than a shorter period. So, while I would police vigorously the line between inducement and threats – as the jury instructions in this case did, [n7] although the majority opinion is less clear on this point – I would, where true threats are alleged, not require a finding of immediacy of the threatened harm.

Second, the addition: Although this court's cases on threats have not generally set any state of mind requirements, I would add to the *Kelner* requirements for proscribable threats in the public protest context the additional consideration whether the defendant subjectively intended the specific victims to understand the communication as an unequivocal threat that the speaker or his agents or coconspirators would physically harm them. [n8] Especially

where the plaintiffs in such circumstances are relying *only* on surrounding context and are doing so to overcome the literal import of the words spoken, impairment of free public debate on public issues through self-censorship is a distinct possibility unless there is convincing proof that the literal meaning of the words was not what the defendants intended to convey.

The subjective intent requirement for alleged threats delivered in the course of public protest comports with Supreme Court precedent, both directly and by analogy. Although the Supreme Court has yet to outline fully the constitutional limitations applicable to proscription of threats, in its most direct look at the subject the Court expressed "grave doubts" that a person could be liable for threatening expression solely on the basis of an objective standard. *Watts v. United States*, 394 U.S. 705, 707-08 (1969). A few months later, in *Brandenburg*, the Court held that in an incitement case, the plaintiff or the government must not only prove that a statement "is likely to incite or produce" imminent lawless action, but must also prove that the statement "is directed to inciting or producing" such action. 395 U.S. at 447. This latter requirement is a subjective intent prerequisite, as it turns the speaker's liability in an incitement case on how the speaker intends others to understands his words. See also *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (speech cannot be punished when no evidence exists that "words were intended to produce" imminent disorder).

With regard to this subjective intent requirement, there is no meaningful distinction between incitement cases and threat cases such as this one – that is, cases involving public protest speech, especially where the alleged threat, on its face, consisted entirely of advocacy. The First Amendment protects advocacy statements that are likely to produce imminent violent action, so long as the statements are not directed at producing such action. To do otherwise would be to endanger the First Amendment protection accorded advocacy of political change by holding speakers responsible for an impact they did not intend.

Similarly, a purely objective standard for judging the protection accorded such speech would chill speakers from engaging in facially protected public protest speech that some might think, in context, will be understood as a true threat although not intended as such. Unsure of whether their rough and tumble protected speech would be interpreted by a reasonable person as a threat, speakers will silence themselves rather than risk liability. Even though the Supreme Court has stated that protected political speech "is often vituperative, abusive, and inexact," speakers wishing to take advantage of these protected rhetorical means may be fearful of doing so under the majority's purely objective approach. *Watts*, 394 U.S. at 708; *see also Rogers v. United States*, 422 U.S. 35, 47, 45 L. Ed. 2d 1, 95 S. Ct. 2091 (1975) (Marshall, J., concurring). [n9]

When the district court issued the injunction against the defendants, the court, for reasons it does not explain, relied on a different definition of threat than the one it instructed the jury to use. In contrast to the definition relied upon by the jury, the definition used for purposes of the injunction correctly incorporated the subjective intent requirement mandated by the First Amendment. *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Advocates*, 41 F. Supp. 2d 1130, 1155 n.1 (D. Or. 1999). In addition, the district court found that the defendants did intend to threaten. As a result, the injunction comes close to conforming on its face to the dictates of the First Amendment. The injunction still falls short, however, because the district court did not state that a threat must be unequivocal, nor did it find the posters to be unequivocal threats. As I explain below, any definition of threats that does not include the unequivocal requirement provides too little protection for public political speech. [n10]

Third, the explication: "Unequivocal" cannot mean literal: Ryder trucks, in the United States in the 1990s, and burning crosses, in the United States in the twentieth and twenty-first centuries, have unambiguous meanings that the individuals targeted will be hurt (at least unless they do what the perpetrator of the threat wants them to do, whether it be stop performing abortions or move out of town). Instead,

"unequivocal" means to me unambiguous, given the context. As such, the requirement is essentially a heightened burden of proof, requiring that a threatening meaning be clearly and convincingly apparent. And in determining whether that proof standard has been met, I would continue to apply the objective standard the majority embraces, based on our cases, in determining whether the speech in fact communicates an intent to harm specific individuals.

This case, I repeat, is uniquely difficult because to perceive a threat, one must *disregard* the actual language used and rely on context to *negate* the ordinary meaning of the communication. Further, the actual language is, in its own right, core First Amendment speech, speech that to a naive reader communicates protected information and ideas. So the crux of the plaintiffs' cause of action (once one accepts that only statements that evince an intention by the speaker or his or her agents to carry out the threat can be actionable) is really an assertion that the defendants were using Aesopian language or could be understood as doing so, and that the context in which the speech must be viewed provides the necessary evidence of the defendants' true, albeit coded, meaning. [n11]

The first set of contextual evidence involves the poster/murder/poster/murder pattern the majority principally relies upon. Had the murders – or any murders, or any serious violence – been committed by the defendants and had the plaintiffs known that, the inference from the poster/murder pattern that the publication by them of posters similar to those previously followed by a murder might be a strong one. [n12] The inference would be stronger had the defendants also put out the earlier posters and had the plaintiffs known that. Neither is the case.

Plaintiffs' main submission to fill this gap was extensive evidence concerning the defendants' opinions condoning the use of violence against medical professionals who perform abortions, including general statements to that effect and particular statements concerning the people who murdered the doctors depicted on the previous posters, stating that their actions were justified and that they should be acquitted.

Plaintiffs' closing argument, for example, went on for pages and pages about defendants' meetings and writings concerning the "justifiability of the use of force."

This evidence is certainly of some pertinence as to what the defendants may have intended to do. [n13] It is more likely that someone who believes in violence would intentionally threaten to commit it. It is also pertinent to what persons in the plaintiffs' position – that is, persons involved in the abortion controversy and alert to the division of opinion within it – would likely understand concerning defendants' communication. Individuals who believe in violence are not only more likely to *threaten* to commit it but also actually to commit it, and so defendants' views might well influence plaintiffs' perception of their speech. And since the defendants would know that, defendants' *public* statements approving the use of violence against doctors who perform abortion are relevant to whether reasonable speakers in defendants' position would expect their communications to be understood as threats.

At the same time, heavy reliance on evidence of this kind raises profound First Amendment issues of its own. One cannot read plaintiffs' closing argument in this case without fearing that the jury was being encouraged to hold the defendants liable for their abstract advocacy of violence rather than for the alleged coded threats in the posters and website, the instructions to the jury to the contrary notwithstanding. And while advocacy evidence may make both an intent to threaten and a perception that there was a threat more likely, that is not unequivocally so. People do not always practice what they preach, as the stringent incitement standard recognizes. If we are serious about protecting advocacy of positions such as defendants' sanctioning of violence, as we are constrained to be, then permitting that protected speech to be the determinative "context" for holding other facially protected, public protest speech – the posters and website in this case – to be a "true threat" seems to me simply unacceptable under the First Amendment.

Finally, I note that the approach I've outlined here fully comports with *Claiborne Hardware*. *Claiborne Hardware*

applied an "extreme care" standard in determining "liability on the basis of a public address – which predominantly contained highly charged political rhetoric." 458 U.S. at 926-927. It went on to note that "in the passionate atmosphere in which the speeches were delivered, they *might* have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended." *Id.* at 927 (emphasis added). After reviewing the actual words used in context, however, the Court concluded that "Evers' addresses did not exceed the bounds of protected speech." *Id.* at 929. As I read the opinion, it held, essentially, that the supposed threats were not on their face unequivocal and were not made unequivocal by any contextual factors. So here.

I would therefore hold that under the special rules I would apply to public protest speech such as that in this case, plaintiffs' judgment cannot stand because, after a proper review of the record, we would have to conclude that there was no unequivocal, unconditional [n14] and specific threat. [n15]

II

Federal Law Enforcement Officers' Testimony Regarding Threats

I also disagree with the majority's conclusion that permitting law enforcement officers to testify as to their opinions about the meaning and import of the posters at issue was within the district court's discretion. The government may not seek to persuade a jury that certain speech contains characteristics that place it outside the realm of constitutionally protected speech by providing in testimony, as opposed to in a criminal indictment, its "nonjudicial determination" on the ultimate legal issue to be decided. *Hill v. Rolleri*, 615 F.2d 886, 890 (9th Cir. 1980).

The district court permitted the officers to repeat in testimony the warnings that the officers gave the plaintiffs after the release of the posters, purportedly in order to show the plaintiffs' state-of-mind in response to the posters. Under this rationale, the testimony had very little, if any, relevance to the issues before the jury, and, especially in light of the

First Amendment concerns the testimony raises, the resulting prejudice greatly outweighed its minimal probative value. The district court, therefore, abused its discretion in failing to exclude this testimony under Fed. R. Evid. 403. [n16]

1. *The testimony*: The district court permitted the plaintiffs to call to testify an FBI agent, with 25 years experience, and two United States Marshals, one with 26 years and the other with 14 years experience. The following testimony was given:

> "I told her that I was in receipt of *threat information* in the form of a flyer."
>
> "That I had received a copy of a list called the Deadly Dozen List, which listed 13 doctors, who perform abortions, and that it was *threatening in nature* . . . ."
>
> "I told her that I thought that her teachers, the teachers of her children, should know about this *threat*, as well, in order to maintain the security of the children."
>
> "I told her that the children should be aware of – of *the threat*."
>
> "I told him that he was on a *threat list* . . . ."
>
> "I told her that if she received *additional threats* or wanted protection, these were the numbers to contact . . . ."
>
> "And we discussed the reasons we believed that the *threat was serious* . . . . We discussed the escalation in the incidents over the prior couple of years. We talked about the murder of Dr. Gunn in Florida. We talked about shootings involving Dr. Tiller in Kansas. We talked about shootings involving Dr. Christ. We talked about Michael

> Bray and his affiliation with the American Coalition of Life Advocates."
>
> "Well, because of the *nature of the threats*, and – I asked Dr. Hern to – he had a bulletproof vest. I thought it would be a good thing if he wore that."

(emphases added). The testimony not only revealed the individual law enforcement officers' opinions of the meaning of the posters, but also informed the jury about the opinion of "headquarters," as follows:

> "I told him . . . that *I had been given instructions* to notify – *to immediately notify him*, so that he could take some personal precautions for his safety."
>
> "I was contacted by my *headquarters in Washington, D.C.* . . . I advised her that the Marshal's Service was offering her protection, because her name appeared on the list, and stated that if she wanted protection, I would forward the request to our headquarters, who would then forward it to *the Department of Justice*."
>
> "*I was directed by my headquarters to immediately contact Dr. Warren Hern, because he was listed on the -- the document. But, additionally, I was directed to contact all of the clinics in the district of Colorado." The officer further testified that he did contact all of the clinics in Colorado.*
>
> "*Headquarters was taking this threat very seriously.*"
>
> "I explained to Dr. Hern that Michael Bray had been a conspirator in – or involved in a conspiracy to blow up several abortion clinics. And because of his affiliation, in addition to the other things we discussed, that *my headquarters believed that*

this was [a] serious threat, and something that - - that we had to act on immediately."

(emphases added).

My major concern here involves the First Amendment repercussions of allowing testimony by government employees as to the government's opinion concerning whether speech is outside the First Amendment's protections. In keeping with traditional Rule 403 analysis, however, I first explain why the testimony did not serve to elucidate any of the issues properly before the jury and then turn to the prejudicial effect the testimony had on the defendants' First Amendment rights.

2. *Basic Rule 403 analysis*: The majority holds the law enforcement testimony probative because it has "some tendency to show the physicians' state of mind when they found out they were named on 'wanted'-type posters . . . ." Majority Op. at 36a. Under the definition of a true threat that the majority uses (and under the one I would adopt, *see* Part I, *supra*) the *plaintiffs'* state of mind is relevant only to the extent that it tends to show "whether a reasonable person would foresee" that the plaintiffs would interpret the posters as threats. Majority Op. at 25a-26a. The officers' testimony concerning the warnings muddled rather than illuminated the inquiry into the question how a reasonable lay person would understand the posters, as that testimony revealed the officers' reaction to the posters, not the plaintiffs'. The true threat standard focuses on how "those to whom the maker communicates the statement" would "interpret[]" it, not on the government's determination of whether a threat was made. *See id.* So the officers' reaction to the posters is largely irrelevant. Further, to the extent the testimony did tend to show the plaintiffs' state of mind, it suggested what the plaintiffs' reaction may have been to the officers' warnings or to the combination of learning about the posters and receiving the warnings, not simply to the posters themselves.

During the testimony of one of the officers, the district court instructed the jury to consider the testimony only for what it revealed about the state of mind of the recipient of the warnings and not to take the testimony as an

"administrative decision" that the posters constituted true threats. To the extent that the officers' testimony did bear on any pertinent issue – which, as I indicated above, is little if at all – the court's limiting instruction did not do much to maintain the jury's focus on this issue, as the court did not repeat the instruction when each of the law enforcement officers testified, nor did the court instruct the jury on this issue before deliberations, despite the defendants' request that the court do so.

It is unlikely that a jury can put aside the opinions of an FBI agent and United States Marshals – and their headquarters – as to the nature of the speech and instead focus solely on how those opinions bore on the plaintiffs' state of mind. See *United States v. Gutierrez*, 995 F.2d 169, 172 (9th Cir. 1993) ("The expert testimony of a law enforcement officer . . . often carries an aura of special reliability and trustworthiness.") (quoting *United States v. Espinosa*, 827 F.2d 604, 613 (9th Cir. 1987)). On traditional evidentiary grounds alone, such testimony should not be admitted in threats cases.

3. *First Amendment-related prejudice*: Turning now to the issue I find most troubling, the First Amendment ramifications of the law enforcement officers' testimony:

Admitting testimony by law enforcement officers as to whether certain speech has the primary characteristic of an unprotected category (for instance, is a serious threat, or is obscene, or is false) allows the government not only to prohibit or burden that category of speech (true threats, obscenity, defamation), but also persuasively to shape the jury's determination of what speech falls into the unprotected category. The obvious risk is that the government will use its "aura of special reliability and trustworthiness, " *Gutierrez*, 995 F.2d at 172, to describe as undeserving of constitutional protection speech that in fact is only unpopular with the government. In *Watts*, the Court looked to the reaction of those to whom the speech was directed to determine how the speech should be taken. 394 U.S. at 708. Had the Secret Service run to the President to inform him of Watts' speech and warn him of the "threat," the Secret Service's reaction,

and the President's resulting fear, presumably would not have been allowed to override the reaction of the actual audience to the speech.

Furthermore, the officers' testimony here quite naturally tended to blur the lines between various categories of speech – true threats, incitement, and perhaps some form of "putting in harm's way" – and therefore risked a jury finding of liability for speech that may not fall within the "threat" category as narrowly defined for First Amendment purposes. The officers testified that they told the plaintiffs the speech was a threat and one that should be taken seriously, but there is no indication that the officers distinguished between a "true" threat – a threat of violence by the speaker – and speech warning that a third party would harm the plaintiffs or speech containing a threatening quality because of its tendency to incite others or to put the plaintiffs in harm's way. Nor did the district court instruct the jury that the officers might use the term "threat" in a way that differed from the type of "threat" that does not receive constitutional protection.

The majority also concludes that the district court properly admitted the officers' testimony "to show the knowledge and intent of ACLA in distributing the posters regardless of the reaction they precipitated." Majority Op. at 36a. Testimony as to the statements made by the officers to the plaintiffs has little relevance to the intent and knowledge of the defendants. And, more importantly, the same First Amendment concerns come into play here: Under this rationale, if federal law enforcement officials dislike certain speech, they can take a substantial step towards rendering it unprotected by expressing publicly the view that such speech is threatening, because if the speaker then repeats the speech he does so with knowledge of the reaction it precipitated.

To the extent that our law allows law enforcement officers otherwise to testify directly on ultimate factual and legal questions that the jury must decide, we should draw the line at permitting the use of this persuasive aura in testimony that certain speech is of such a nature that it is undeserving of constitutional protection. Permitting such testimony

cannot be reconciled with the role of the First Amendment to protect freedom of speech from suppression by the government.

III

Deposition Summaries

The majority approves – quite in passing – the district court's insistence that the parties submit as evidence summaries of deposition testimony, not the testimony itself. Majority Op. at 37a, 51a n. 18. As I read Federal Rule of Civil Procedure 32, which governs the admission of deposition testimony, it does not permit the substitution of summaries for actual testimony. Nor is there anything in the Federal Rules of Evidence or this court's case law to the contrary. Rather, it is a fundamental precept of our system for ascertaining facts that a jury is entitled to learn what a witness actually *said*, rather than an inexact rendition presented by counsel (and probably initially drafted by paralegals).

Language can be subtle, ambiguous and malleable. Paraphrases, as any judge reading lawyers' briefs knows, are no substitute for quotation of the actual words spoken by a witness. As often as not, a check of the transcript will reveal that the language the witness actually spoke, in context, may well mean something other than what counsel has represented.

That does not mean that counsel is lying, but that shades of meaning can be critical. "As the childhood game of 'telephone' well demonstrates, words change significantly in the course of their re-telling by third parties." *United States v. Pena-Espinoza*, 47 F.3d 356, 364 (9th Cir. 1995) (Reinhardt, J., dissenting). Indeed, the game of "telephone" requires only that a listener repeat the exact language that he or she heard; a summary, in contrast, necessarily requires the more subjective choice of *different* words to convey the general idea communicated by the original language. "There is simply no way to summarize the contents of a transcript without offering to some degree a subjective view of their meaning and import." *Id.* Because that is so, summaries of witnesses'

testimony are likely to distort the import of the actual testimony given and so impede the jury's search for truth.

Our legal system recognizes, in various contexts, that the same set of words may frequently lend itself to more than one reasonable interpretation. *See, e.g., Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). There is no reason to believe that a lawyer will not adopt the interpretation most favorable to his or her client, so long as the interpretation is reasonable, even if not perhaps the most reasonable. *See United States v. Leon-Reyes*, 177 F.3d 816, 820 (9th Cir. 1999) ("Summaries are normally prepared by an interested party and therefore may not be completely accurate or may be tainted with the preparing party's bias."). In our adversary system, it is the role of the trier of fact – not the advocate – ultimately to determine the meaning of witness testimony.

Further, access to the actual language a witness used – even on a cold record – is often essential to determining the witness's credibility and hence the weight, if any, to be accorded the testimony. Equivocations, hesitations, and internal contradictions may all be smoothed over by summaries that purport to extract the content of a witness's testimony. Requiring counsel to summarize testimony without allowing the trier of fact to have access to the testimony itself necessarily precludes the trier of fact from properly exercising his or her truth-determining role.

The record here provides concrete examples of various ways in which summaries can distort the import of the actual testimony and thereby impair the truth-ascertaining process. For instance, the summary of Michael Dodds' deposition condensed inaccurately the testimony he gave. The summary stated:

> The other physician, on the Deadly Dozen List, from Dodds' region, Dr. Douglas Karpen, is from the Houston, Texas, area. Dodds believes that defendant Donald Treshman provided that name.

What Dodds actually said in his deposition regarding the source of Karpen's name for the Deadly Dozen list was "I don't know." [n17]

The deposition of Roy McMillan provides an example of testimony that could reasonably be interpreted in either of two ways, but the summary provided the jury with only one interpretation. The summary stated:

> As for the additional murder of Mr. Barrett [Dr. Britton's escort], McMillan felt that if it was, quote, right for one person, it would be right for someone else, end quote.

A look at McMillan's deposition transcript (which the defendants introduced in rebuttal) sheds a somewhat different light on the quotation included in the summary. In his deposition, McMillan was first asked about a petition in support of Michael Griffin, who killed Dr. Gunn, and then asked about "the second petition which was for Mr. Hill," who killed Mr. Barrett and Dr. Britton. The testimony went as follows:

> [Answer:] This is identical – pretty much identical to the one that was circulated about the first abortionist's termination. And this was – this, the second one was regarding Paul Hill.
>
> Question, and this one was put out by Michael Bray, is that right?
>
> Answer, I am not sure who put it out, but I concurred that if it was right for one person, it would be right for someone else.

Thus, it appears that McMillan likely meant that if a petition in support of Griffin was right, so too was a petition in support of Hill. Either way, the interpretation should have been left entirely to the jury. (It is quite unlikely that this difference in meaning could have substantively affected the verdict, but that conclusion would require a separate inquiry.)

Finally, the record here also contains summary language that although technically accurate may nonetheless have conveyed a subtly different, but potentially important, sense of the speaker or of the events described from the testimony itself. The summary of Dawn Stover's deposition began with the sentence:

> Dawn Stover is the associate director of defendant Advocates for Life Ministries . . . .

Here is the excerpt from Stover's deposition transcript:

> Question, are you still the associate director of Advocates for Life Ministries? Answer, I would guess that, but I have been inactive for so long that – I am still affiliated. I still talk to a couple of people in Advocates, but I don't do any directing and haven't done any directing for years. So – and having a title has never been that big of an issue. Question, was that ever a paid position? Answer, no. Question, so you don't know whether or not your status is currently associate director in terms of the eyes of the organization? Answer, I honestly don't know how they would perceive me as. I don't know, just because I have been inactive for so long, but they may still.

Certainly, the jury reasonably could have found from Stover's testimony that she "is the associate director" of Advocates for Life Ministries, as the summary stated. At the same time, however, the jury might have considered Stover's current role in the organization as quite different depending on which of the above versions of her testimony they heard. One set of words rarely conveys precisely the same meaning as a second, truncated version.

The majority today pays no heed to all these "dangers of witnesses summarizing oral testimony." *United States v. Baker*, 10 F.3d 1374, 1412 (9th Cir. 1993), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000), and instead notes, without qualification, only that

the presentation of deposition testimony "in the form of summaries was within the court's discretion under Rule 611(a)," Majority Op. at 37a, 51a n. 18. The very first mandate of Rule 611(a), however, requires the trial court to "make the interrogation and presentation [of evidence] effective for the ascertainment of truth." Fed. R. Evid. 611(a)(1). [n17] For all the reasons just discussed, substituting summaries of testimony for a word-for-word transcript itself can hardly serve as an" effective" mode "for the ascertainment of truth." *See id.*

Moreover, it is Fed. R. Civ. Proc. 32, not Rule 611(a) of the Rules of Evidence, that directly, and with particularity, governs the presentation of deposition testimony. As I read it, Rule 32 decidedly does not permit courts to authorize the use of summaries in place of actual testimony.

Rule 32 begins with this general provision:

> At the trial . . . any part or all of a deposition, *so far as admissible under the rules of evidence applied as though the witness were then present and testifying*, may be used . . . .

Rule 32(a) (emphasis added); *see also* Rule 32(b) ("Objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."). A witness who is "present and testifying" is doing just that – "testifying," not providing capsule versions of his or her testimony. And using "any part or all of a deposition" does not equate to using a paraphrased, condensed version of a deposition, any more than a course syllabus directing students to read "Hamlet" intends to subsume within that directive the Classic Comics version of "Hamlet."

Rule 32 also specifically addresses the "Form of Presentation" of deposition testimony, giving no indication that a district court may admit a summary of deposition testimony in lieu of the testimony itself. The pertinent section states, in relevant part:

> Except as otherwise directed by the court, a party offering *deposition testimony* pursuant to this rule *may offer it in stenographic or nonstenographic form*, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered.

Rule 32(c) (emphasis added). The rule therefore clearly anticipates the admission of stenographic or nonstenographic forms of *testimony*, not summaries. [n18] Although Rule 32(c) does apply "except as otherwise directed by the court," this caveat is most sensibly read to give the court discretion to direct either stenographic or non-stenographic presentation of deposition testimony, not to permit the presentation as "evidence" of summaries that approximate but do not reproduce the language the witness used in *any* form.

Bolstering this conclusion regarding Rule 32(c), Rule 28 provides for the taking of depositions in foreign countries "pursuant to a letter of request," and expressly grants the district court the discretion to admit the response to such a letter even if it is not a "verbatim transcript" of the testimony or if it exhibits "any similar departure from the requirements for depositions taken within the United States under these rules." *See* Rule 28(b). The assumption quite obviously underlying Rule 28 is that any report of testimony other than a "verbatim transcript" is a "departure from the requirements for depositions taken within the United States under these rules."

More generally, Rule 32 demonstrates an overall preference for the presentation of testimony in the manner that, to the extent practical, best provides the jury with complete information concerning the witness's demeanor. Rule 32(a), for example, clearly favors live testimony over deposition evidence by limiting the use of depositions to three situations: when an adverse party is the deponent; for impeachment purposes; or when the deponent is not available to testify at trial. Rule 32(a)(1)-(3). By so doing, the rule reflects the historical belief that live testimony better enables the jury to adjudge the credibility of a witness and therefore to determine the weight and import ascribed to the

witness's testimony. Deposition testimony is itself only second-best.

When the rules do allow the admission of deposition testimony in a jury trial, Rule 32(c) permits a party in some instances to insist upon the presentation of testimony in "nonstenographic form," allowing the jury to hear and/or see the testimony as it was given. Rule 32(c) ("On request of any party in a case tried before a jury, *deposition testimony* offered other than for impeachment purposes *shall be presented in nonstenographic form*, if available, unless the court for good cause orders otherwise.") (emphasis added). Rule 32(c), by favoring audio and video recordings over the reading of a cold transcript, therefore establishes a preference for testimony that is the most like live testimony. Under this scheme, the presentation of deposition testimony in stenographic form is third-best.

Such presentation, however, at least allows the jury to hear or read the actual words used by the witness. Deposition summaries, unless accompanied by a transcript of the testimony, deprive the jury of even this opportunity. With Rule 32's clear preference for live testimony, or for testimony most resembling it, it makes little sense to think the rule tacitly allows for this new, fourth-best, form of evidence, so far removed from the in-person live testimony for which it is a substitute. I conclude that Fed. R. Civ. Proc. Rule 32 withholds from district courts the authority to require the substitution of summaries of deposition testimony for the testimony itself, where truth and falsity are at issue, and that the general language of Fed. R. Evid. Rule 611 cannot override that determination.

There is nothing in our case law to the contrary. We have, while expressing great caution, allowed summaries of evidence in narrow circumstances, but never as a complete substitute for actual transcripts on material matters of historical fact.

For instance, in *Leon-Reyes*, 177 F.3d at 820, a perjury case, we held that the district court did not abuse its discretion in allowing the use of summaries of testimony from a prior trial in which the defendant had allegedly

committed perjury, emphasizing that the district court instructed the jury to consider the summaries only for determining the materiality of the false statements and not for the truth of the witnesses' underlying testimony. *Pena-Espinoza*, 47 F.3d at 360, permitted – although making clear that it did "not wish to condone such procedures" – admission of summaries prepared by the prosecution of telephone call transcripts. The court specifically noted that:

> The transcripts themselves were in evidence and the jury had them to examine during deliberations; the ruling expressly permitted defense counsel to require a reading of the full transcript on cross-examination and to dispute the veracity of the readers' summaries.

Id. Similarly, *Baker*, 10 F.3d at 1411-12, found district court discretion pursuant to Fed. R. Evid. 611(a) to permit a government witness to present summary testimony and a chart estimating, on the basis of testimony at trial, the value of narcotics transactions. Critically, the district court made clear to the jury that the testimony and chart did not constitute evidence:

> The [district] court instructed the jury that the summary testimony and exhibits were not evidence, did not represent an opinion of the court or the prosecution on the credibility of witnesses, and were to be disregarded to the extent the jury found them conflicting with the testimony and evidence received at trial.

Id. at 1411. As in *Pena-Espinoza*, the *Baker* court emphasized that this court is "not blind to the dangers of witnesses summarizing oral testimony" and that "such summaries should be admitted under Rule 611(a) only in exceptional cases." *Id.* at 1412.

Thus, when this court has upheld the admission of summary evidence under the abuse of discretion standard, we have done so not as a *substitute* for transcript evidence

on matters of historical fact, but either on issues *other* than the truth of the matter testified to or as an assistance to the jury, while also including the actual transcripts in the record for the use of the jury or reviewing courts. And none of our cases discuss the provisions of Fed. R. Civ. Proc. Rule 32, because none of them involved deposition summaries as opposed to summaries of other forms of evidence. [n19]

This is not a case in which the parties reached any agreement as to the summaries presented, so I do not consider whether such an agreement would be permissible. Nor did the defendants agree to the use of summaries at all; instead, they maintained a continuing objection to this procedure. And the district court did not review or revise the summaries after receiving objections prepared by the defendants, as it had originally planned to do. *Cf. Leon-Reyes*, 177 F.3d at 820 ("Summaries . . . must be scrutinized by the trial court to ensure that they are accurate, complete, not unduly prejudicial, limited to the relevant issues, and confined by appropriate jury instructions.").

The district court did allow the defendants to present counter-summaries, colored with argument, and, in rebuttal, to introduce excerpts from the transcripts. Such an adversarial procedure, however, does not ensure that the jury will have before it the evidence necessary to informed decision-making. The party responsible for summarizing the testimony may have little reason to move for the admission of the underlying testimony, precisely because that party may prefer its summary to the testimony itself. Likewise, the adverse party will, hopefully, point out blatant inconsistencies between the summary and the testimony, but may choose otherwise to avoid providing the jury with testimony that largely supports a summary introduced by the other side.

Nevertheless, the fact remains that the jury must have the opportunity to review the actual evidence – the transcripts of the testimony – when deliberating as to the meaning of testimony. It is nonsensical to expect the jury to determine the credibility of witnesses and testimony, the special province of the jury, without providing the jury with access to

that testimony. Just as we, as judges, do not read attorneys' paraphrases of statutes when we try to discover what the legislature meant, *see* Fed. R. App. Proc. Rule 28(f), jurors cannot sensibly evaluate the meaning and credibility of words without knowing what those words are.

One final note: The majority presumably finds that the district court has the discretion under Rule 611(a) to require deposition summaries in lieu of the testimony itself in order to "avoid needless consumption of time." Rule 611(a)(2). Because the presentation of deposition summaries, without the agreement of the parties and the admission of the corresponding excerpts, is not "effective for the ascertainment of truth," Rule 611(a)(1), the consumption of time caused by the presentation of actual testimony is not "needless." Moreover, by providing an additional issue for the parties to dispute, the use of summaries is just as likely to increase as to decrease the time spent by counsel and by the court.

I recognize that district courts can and should reasonably limit the amount of time expended on the presentation of deposition testimony. This authority does not, however, give trial courts the discretion to replace such testimony entirely with a Reader's Digest Condensed Books version. [n20]

IV.

Conclusion

As waves of fervent protest movements have ebbed and flowed, the courts have been called upon to delineate and enforce the line between protected speech and communications that are both of little or no value as information, expression of opinion or persuasion of others, and are of considerable harm to others. This judicial task has never been an easy one, as it can require – as here – recognizing the right of protesting groups to question deeply held societal notions of what is morally, politically, economically, or socially correct and what is not. The defendants here pose a special challenge, as they vehemently condone the view that murdering abortion providers –

individuals who are providing medical services protected by the Constitution – is morally justified.

But the defendants have not murdered anyone, and for all the reasons I have discussed, neither their advocacy of doing so nor the posters and website they published crossed the line into unprotected speech. If we are not willing to provide stringent First Amendment protection and a fair trial to those with whom we as a society disagree as well as those with whom we agree – as the Supreme Court did when it struck down the conviction of members of the Ku Klux Klan for their racist, violence-condoning speech in *Brandenburg* – the First Amendment will become a dead letter. Moreover, the next protest group – which may be a new civil rights movement or another group eventually vindicated by acceptance of their goals by society at large – will (unless we cease fulfilling our obligation as judges to be evenhanded) be censored according to the rules applied to the last. I do not believe that the defendants' speech here, on this record and given two major erroneous evidentiary rulings, crossed the line into unprotected speech. I therefore dissent.

Footnotes

n1 In so stating – and elsewhere in this opinion – I do not address the constitutional viability of a cause of action for putting another in harm's way by publicizing information that makes it easier for known or suspected potential assailants to find an intended victim. There was no such cause of action in this case, as Judge Kozinski observes, and I express no view upon whether or under what circumstances such a cause of action could be stated under the law, including under the First Amendment.

n2 Similarly, the First Amendment's overbreadth doctrine extends some protection to speech that is without First Amendment value in order to limit self-censorship of speech that does possess this value. *See* *Massachusetts v. Oakes*, 491 U.S. 576, 581, 105 L. Ed. 2d 493, 109 S. Ct. 2633 (1989).

n3 *See* *New York Times*, 376 U.S. at 279-80 (a public official may not recover damages "for a defamatory falsehood

relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not"); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967) (opinion of Warren, C. J., concurring in the result) (*New York Times* standard applies to defamation cases brought by public figures); *Gertz*, 418 U.S. at 347-49 (*New York Times* standard not required for cases brought by private figure plaintiffs; instead, the states may only not "impose liability without fault" for the defamation of a private figure plaintiff – although a different standard may apply if "the substance of the defamatory statement [does not] make[]substantial danger to reputation apparent" – but the states "may not permit recovery of presumed or punitive damages" without proof of actual malice); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985) (opinion of Powell, J.) (states may allow private figure plaintiffs to recover, without proof of actual malice, presumed or punitive damages for defamatory speech "involving no matters of public concern.").

n4 I discuss below the constitutional importance of the latter requirement – that any proscribed threat communicate the intention of the speaker or his or her agents.

n5 I note that there is one way in which the speech here differs from defamation: False, defamatory speech, even on matters of public concern, does not have *any* significant First Amendment value. *R.A.V.*, 505 U.S. at 383. Although "true threats" also lack such value as a general matter, a "true threat" that includes only facially-protected speech nonetheless *does* have First Amendment value, because it not only is threatening but also has another meaning – the literal, facially-protected meaning – which here falls within the heart of First Amendment speech. For this and other reasons, the categories of defamatory speech and the rules applicable to them cannot rigidly determine the analysis applicable in threats cases.

n6 During the press conference, Mr. Kelner, the defendant, "was seated in military fatigues behind a desk with

a .38 caliber' police special' in front of him," next to "another man . . . dressed in military fatigues." *Id.* The gun and uniform seem to me simply a prop and costume designed to enhance the communication of seriousness of purpose, not proof that the defendant was involved contemporaneously in actual violence.

n7 The jury in this case was instructed that "the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is protected speech under the First Amendment," and that "you are not to consider any evidence that the three statements allegedly 'incite' violence against plaintiffs."

n8 In *Kelner*, the jury was instructed that it needed to find that "*Kelner* 'intended the words as a threat against Yassir Arafat and his lieutenants.'" 534 F.2d at 1025. The *Kelner* court rejected a different intent requirement, namely, an intent to carry out the threatened action. *Id.* at 1025-27. The majority erroneously concludes that the dissenters would require that to find a "true threat," the speaker must have had the latter sort of intent – that is, the speaker must "actually intend to carry out the threat." *See* Majority Op. at 27a. To the contrary, there has been no intimation in either dissent that the speaker need have the intention, or the ability, to do so. Rather, I propose the inclusion of a "specific intent" requirement with regard to the speaker's intent *to threaten* – that is, a requirement that the judge or jury determine whether the speaker intended to place the listener in fear of danger from the speaker or his agents.

n9 The majority opinion does not appear to embrace any such subjective intent standard as a *constitutional* requirement, but does suggest that any such requirement was met here through the instruction on FACE's statutory elements. The jury, however, was specifically instructed several times, quite emphatically, that there is *no* subjective intent requirement in adjudging whether or not a statement is a "true threat." In closing argument, counsel for plaintiffs also informed the jury that subjective intent was not relevant. Further, in a separate instruction devoted to the case's various intent issues, the trial judge reminded the jury that it

did have to find some form of intent when it considered the RICO charges against the defendants and when it considered punitive damages, but did not state that the jury had to find intent when considering whether the defendants violated FACE.

The very next instruction concerned the FACE cause of action and stated, ungrammatically and nearly incoherently, that the plaintiffs must prove that the defendant "made the threat of force to intimidate . . . the plaintiff's . . . ability to . . . provide reproductive health services." Although "intimidate" was defined, correctly, as "place a person in reasonable apprehension of bodily harm," the FACE instruction *left out* the statute's clear motive or purpose requirement – that to be liable the defendant must act "because that person is or has been, or in order to intimidate such person . . . from . . . providing reproductive health services," 18 U.S.C. § 248(a)(1), substituting a confused and confusing locution. A jury specifically and repeatedly admonished not to take into account the defendants' subjective intent would not likely understand the obscure FACE instruction as a requirement that it should do so. There was also a RICO cause of action with separate elements. While the RICO instruction required, in addition to a true threat, an "intent of depriving a plaintiff of his or her . . . protected right to provide abortion services," that is not equivalent to requiring an intent to communicate that the speaker or his or her confederates would physically injure the plaintiff.

n10 Part of the injunction fails to comply with the First Amendment for an additional reason. The injunction not only prevents the defendants from further distributing the posters, it also prevents them from possessing the posters or their equivalents. In effect, this latter part of the injunction regulates the type of written materials that the defendants may possess in the privacy of their homes, directly contradicting the Supreme Court's holding in *Stanley v. Georgia*, 394 U.S. 557 (1969):

> If the First Amendment means anything, it means that a State has no business telling a man, sitting

> alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id. at 565; *see also* *Free Speech Coalition*, 122 S. Ct. at 1403 ("First Amendment freedoms are most in danger when the government seeks to control thought . . . .").

The majority nonetheless upholds the injunction against possession of the posters, distinguishing *Stanley* on the basis that "the posters in this case are quite different from a book; the 'wanted'-type posters themselves – not their ideological content – are the tool for threatening physicians. In this sense, the posters' status is more like conduct than speech." Majority Op. at 43a. But, whatever else they may be, the posters are speech – they express ideas through the use of words and pictures.

The majority also asserts that the "First Amendment interest in retaining possession of the threatening posters is *de minimis*, while ACLA's continued possession of them constitutes part of the threat." *Id.* at 43a. This summation ignores the fact that the posters do have First Amendment value – they express ideas about one of the most contentious political and moral issues of our time. And confined to the defendants' homes, the posters do not place anyone in apprehension of danger or disrupt their lives; they only influence "the moral content of [the defendants'] thoughts." *Stanley*, 394 U.S. at 565. As such, the First Amendment value of the posters is not outweighed by any competing considerations.

n11 The term "Aesopian language" developed in Tsarist Russia to refer to language that, like Aesop's fables, disguises the true meaning of speech by the use of metaphors, symbols and analogies, in order to avoid censorship.

n12 One defendant had been convicted of serious violence some years before the posters and website were published, so I except him from this part of the discussion.

n13 I note that on the instructions actually given to the jury, it is not easy to perceive the pertinence of much of this

evidence. In particular, apart from extensive evidence of defendants' public statements concerning violence against abortion providers, there was also a great deal of evidence concerning their statements in meetings among anti-abortion activists. The jury was instructed that although speech can be a "true threat" no matter what defendants' subjective intent, that intent is nonetheless pertinent context. I am not sure I see why, but since I would make subjective intent directly relevant, the point is not of great importance to this dissent.

n14 "Unconditional" refers to the degree of determination contained in the threat, not whether it is "conditioned" in the sense that the target could avoid the harm by bowing to the speaker's will.

n15 I note as well that the majority, while it articulated a *de novo* review standard with respect to the true threat standard it did apply, did not in fact review the record with an eye to First Amendment concerns such as those I have discussed, nor did it include the intent issue within its review. (Actual malice, a state of mind standard, is precisely the issue upon which the Supreme Court has closely scrutinized the record in defamation cases. *See, e.g., Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989)).

n16 Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

n17 The district court did not allow Treshman to respond in his closing argument to the plaintiffs' argument based on the summaries because the actual transcripts were not in evidence.

n17 Rule 611(a) provides in its entirety:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

n18 The rules make clear that "nonstenographic" refers to audio or visual recording. *See, e.g.*, Rule 32 Advisory Comm. Note: ("This new subdivision [c] . . . is included in view of the increased opportunities for video-recording and audio-recording of depositions under revised Rule 30(b)."); Fed. R. Civ. Proc. 30(b)(2) ("Any party may arrange for a transcription to be made from the recording of a deposition taken by non-stenographic means."); Rule 30 Advisory Comm. Note ("The primary change in subdivision (b) is that parties will be authorized to record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other counsel."); Rule 30 Advisory Comm. Note ("A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required by Rule 26(a)(3)(B) and Rule 32(c) if the deposition is later to be offered as evidence at trial . . . ."); Rule 26(a)(3) ("[A] party must provide . . . the following information regarding the evidence that it may present at trial . . .: (B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony.").

n19 Although the Fourth, Fifth, and Seventh Circuits have generally approved the use of deposition summaries for the oral presentation of deposition evidence, I have found no case in which it is clear that the pertinent portions of the transcripts were not also admitted as evidence and available for jury review. *See* *Oostendorp v. Khanna*, 937 F.2d 1177, 1179-80 (7th Cir. 1991); *Walker v. Action Indus., Inc.*, 802 F.2d 703, 712 (4th Cir. 1986); *Kingsley v. Baker/Beech-Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir. 1977) (deposition transcripts definitely admitted as evidence).

n20 I do not address whether the use of deposition summaries in this case was harmless error, *see Cerrato v. San Francisco Cmty. Coll. Dist.*, 26 F.3d 968, 974 (9th Cir. 1994) ("The harmless error standard in civil cases is whether the jury's verdict is more probably than not untainted by the error."), because the majority does not so hold.

No. 99-35320, No. 99-35325, No. 99-35327,
No. 99-35331, No. 99-35333, No. 99-35405

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
Plaintiffs-Appellees,

and KAREN SWEIGERT, M.D.,
Plaintiff,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID A. CRANE; TIMOTHY PAUL DRESTE; MICHAEL B. DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; STEPHEN P. MEARS; BRUCE EVAN MURCH; CATHERINE RAMEY; DAWN MARIE STOVER; CHARLES WYSONG,
Defendants,

and MONICA MIGLIORINO MILLER; DONALD TRESHMAN,
Defendants-Appellants.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
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Defendants,

and MICHAEL DODDS; CHARLES ROY MCMILLAN; BRUCE EVAN MURCH,
Defendants-Appellants.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
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Defendants,

and TIMOTHY PAUL DRESTE; JOSEPH L. FOREMAN; CHARLES WYSONG,
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PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE INC.; PORTLAND FEMINIST

WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
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Plaintiff,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID A. CRANE; CATHERINE RAMEY; DAWN MARIE STOVER,
Defendants-Appellants,

and TIMOTHY PAUL DRESTE; MICHAEL DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; STEPHEN P. MEARS; MONICA MIGLIORINO MILLER; BRUCE EVAN MURCH; DONALD TRESHMAN; CHARLES WYSONG,
Defendants.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
Plaintiffs-Appellees,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID A. CRANE; TIMOTHY PAUL DRESTE; MICHAEL B. DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; BRUCE EVAN MURCH; CATHERINE RAMEY; DAWN MARIE STOVER; DONALD TRESHMAN; CHARLES WYSONG,
Defendants.

PAUL DEPARRIE,
Movant-Appellant.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.; KAREN SWEIGERT, M.D., individually and on behalf of all persons similarly situated,
Plaintiffs-Appellees,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID CRANE; TIMOTHY PAUL DRESTE; MICHAEL DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; MONICA MIGLIORINO MILLER; BRUCE EVAN MURCH; CATHERINE RAMEY; DAWN MARIE STOVER; DONALD TRESHMAN; CHARLES WYSONG,
Defendants-Appellants.

September 12, 2000, Argued; September 15, 2000 *, Submitted

March 28, 2001, Filed

COUNSEL:
Christopher A. Ferrara, American Catholic Lawyers Association Inc., Ramsey, New Jersey, argued the cause for all Appellants, and submitted a brief on behalf of appellant Donald J. Treshman.

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Robert M. O'Neil, for amicus curiae Thomas Jefferson Center for the Protection of Free Expression, Charlottesville, Virginia, in support of reversal.

Paul deParrie, Portland, Oregon, amicus curiae, in support of reversal.

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Susan M. Popik, Chapman, Popik & White, San Francisco, California, for amici curiae Feminist Majority Foundation, Center for Reproductive Law and Policy, National Abortion and Reproductive Rights Action League and NARAL Foundation, National Abortion Federation, National Coalition of Abortion Providers, National Organization for Women Foundation, NOW Legal Defense and Education Fund, National Women's Health Foundation, Northwest Women's Law Center, Physicians for Reproductive Choice and Health, and Women's Law Project, in support of affirmance.

Richard Blumenthal, Attorney General of Connecticut, for amici curiae Connecticut, Arizona, California, Colorado, Hawaii, Kansas, Montana, Nevada, New York, Oklahoma, Oregon and Washington, in support of affirmance.

Erwin Chemerinsky, University of Southern California Law School, Los Angeles, California, for amici curiae Anti-Defamation League, the American Jewish Committee, Hadassah, the Women's Zionist Organization of America, Inc., in support of affirmance.

JUDGES:
Before: Alex Kozinski and Andrew J. Kleinfeld, Circuit Judges, and William W Schwarzer, District Judge. ** Opinion by Judge Kozinski.

OPINIONBY:
Alex Kozinski

OPINION:

KOZINSKI, Circuit Judge:

Anti-abortion activists intimidated abortion providers by publishing their names and addresses. A jury awarded more than $ 100 million in actual and punitive damages against the activists, and the district court enjoined their speech. We consider whether such speech is protected by the First Amendment.

I

During a 1995 meeting called to mark the anniversary of *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), the American Coalition of Life Activists (ACLA) unveiled a poster listing the names and addresses of the "Deadly Dozen," a group of doctors who perform abortions. In large print, the poster declared them guilty of "crimes against humanity" and offered $ 5,000 for information leading to the "arrest, conviction and revocation of license to practice medicine." The poster was later published in an affiliated magazine, *Life Advocate*, and distributed at ACLA events.

Later that year, in front of the St. Louis federal courthouse, ACLA presented a second poster, this time targeting Dr. Robert Crist. The poster accused Crist of crimes against humanity and various acts of medical malpractice, including a botched abortion that caused the death of a woman. Like the Deadly Dozen List, the poster included Crist's home and work addresses, and in addition, featured his photograph. The poster offered $ 500 to "any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines" (which prohibit violence).

In January 1996, at its next Roe anniversary event, ACLA unveiled a series of dossiers it had compiled on doctors, clinic employees, politicians, judges and other abortion rights supporters. ACLA dubbed these the "Nuremberg Files," and announced that it had collected the pictures, addresses and other information in the files so that Nuremberg-like war crimes trials could be conducted in "perfectly legal courts

once the tide of this nation's opinion turns against the wanton slaughter of God's children." ACLA sent hard copies of the files to Neal Horsley, an anti-abortion activist, who posted the information on a website. [n1] The website listed the names of doctors and others who provide or support abortion and called on visitors to supply additional names. [n2] The website marked the names of those already victimized by anti-abortion terrorists, striking through the names of those who had been murdered and graying out the names of the wounded. Although ACLA's name originally appeared on the website, Horsley removed it after the initiation of this lawsuit.

Neither the posters nor the website contained any explicit threats against the doctors. But the doctors knew that similar posters prepared by others had preceded clinic violence in the past. By publishing the names and addresses, ACLA robbed the doctors of their anonymity and gave violent anti-abortion activists the information to find them. The doctors responded to this unwelcome attention by donning bulletproof vests, drawing the curtains on the windows of their homes and accepting the protection of U.S. Marshals.

Some of the doctors went on the offensive. Along with two Portland-based health centers, the doctors sued ACLA, twelve activists and an affiliated organization, alleging that their threatening statements violated state and federal law, including the Freedom of Access to Clinic Entrances Act of 1994 (FACE), 18 U.S.C. § 248. [n3] Because the doctors claimed they were harmed by defendants' speech, the district court instructed the jury that defendants could only be liable if their statements were "true threats" and therefore unprotected by the First Amendment. [n4] In a special verdict, the jury found that all the statements were true threats and awarded the doctors $ 107 million in actual and punitive damages. [n5] The district court then issued an injunction barring defendants from making or distributing the posters, the webpage or anything similar. ACLA and the other defendants appeal, claiming that their statements are protected by the First Amendment. [n6]

II

A. Extreme rhetoric and violent action have marked many political movements in American history. Patriots intimidated loyalists in both word and deed as they gathered support for American independence. John Brown and other abolitionists, convinced that God was on their side, committed murder in pursuit of their cause. In more modern times, the labor, anti-war, animal rights and environmental movements all have had their violent fringes. As a result, much of what was said even by nonviolent participants in these movements acquired a tinge of menace.

The Supreme Court confronted this problem in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982). There, a group of white-owned businesses sued the NAACP and others who organized a civil rights boycott against the stores. To give the boycott teeth, activists wearing black hats stood outside the stores and wrote down the names of black patrons. After these names were read aloud at meetings and published in a newspaper, sporadic acts of violence were committed against the persons and property of those on the list. At one public rally, Charles Evers, a boycott organizer, threatened that boycott breakers would be "disciplined" and warned that the sheriff could not protect them at night. *See id.* at 902. At another rally, Evers stated, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *See id.* The Mississippi courts held the boycott organizers liable based on Evers's statements and the activities of the black-hatted activists.

The Supreme Court acknowledged that Evers's statements could be interpreted as inviting violent retaliation, "or at least as *intending to create a fear of violence* whether or not improper discipline was specifically intended." Id. at 927 (emphasis added). Nevertheless, it held that the statements were protected because there was insufficient evidence that Evers had "authorized, ratified, or directly threatened acts of violence." *Id.* at 929. Nor was publication of the boycott violators' names a sufficient basis for liability, even though collecting and publishing the names contributed

to the atmosphere of intimidation that had harmed plaintiffs. *See id.* at 925-26. While Charles Evers and the defendants in our case pursued very different political goals, the two cases have one key thing in common: Political activists used words in an effort to bend opponents to their will.

The First Amendment protects ACLA's statements no less than the statements of the NAACP. Defendants can only be held liable if they "authorized, ratified, or directly threatened" violence. If defendants threatened to commit violent acts, by working alone or with others, then their statements could properly support the verdict. But if their statements merely encouraged unrelated terrorists, then their words are protected by the First Amendment.

Political speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party. In *Brandenburg v. Ohio*, 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969) (per curiam), the Supreme Court held that the First Amendment protects speech that encourages others to commit violence, unless the speech is capable of "producing imminent lawless action. " *Id.* at 447. It doesn't matter if the speech makes future violence more likely; advocating "illegal action at some indefinite future time" is protected. *Hess v. Indiana*, 414 U.S. 105, 108, 38 L. Ed. 2d 303, 94 S. Ct. 326 (1973) (per curiam). If the First Amendment protects speech advocating violence, then it must also protect speech that does not advocate violence but still makes it more likely. Unless ACLA threatened that its members would themselves assault the doctors, the First Amendment protects its speech.[n7]

B. ACLA's speech no doubt frightened the doctors, but the constitutional question turns on the source of their fear.[n8] The doctors might have understood the statements as veiled threats that ACLA's members (or others working with ACLA) would inflict bodily harm on the doctors unless they stopped performing abortions. So interpreted, the statements are unprotected by the First Amendment, regardless of whether the activists had the means or intent to carry out the threats. *See United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 n.

3 (9th Cir. 1990). So long as they should have foreseen that the doctors would take the threats seriously, the speech is unlawful. *See id.* at 1265. [n9]

But the statements might also have scared the doctors in another way. By singling out the plaintiffs from among the thousands across the country who are involved in delivering abortion services, ACLA called them to the unfriendly attention of violent anti-abortion activists. And by publishing the doctors' addresses, ACLA made it easier for any would-be terrorists to carry out their gruesome mission. [n10] From the doctors' point of view, such speech may be just as frightening as a direct threat, but it remains protected under *Claiborne Hardware.*

The jury would be entitled to hold defendants liable if it understood the statements as expressing their intention to assault the doctors but not if it understood the statements as merely encouraging or making it more likely that others would do so. But the jury instruction was ambiguous on this critical point. The instruction provided that "[a] statement is a 'true threat' when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault." Jury Instruction No. 10, at 14. This instruction was consistent with our previous threat cases. *See Lovell v. Powell Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996). But in those previous cases, there was no need to emphasize that threats must be direct because the speakers themselves made it perfectly clear that they would be the ones to carry out the threats. [n11] Under the instruction in this case, the jury could have found the anti-abortion activists liable based on the fact that, by publishing the doctors' names, the activists made it more likely that the doctors would be harmed by third parties.

This is not a fanciful possibility. The record contains much evidence that the doctors were frightened, at least in part, because they anticipated that their unwelcome notoriety could expose them to physical attacks from third parties unrelated to defendants. For example, plaintiff Dr. Elizabeth Newhall testified, "I feel like my risk comes from being

identified as a target. And ...all the John Salvis in the world know who I am, and that's my concern." [n12] Testimony of Elizabeth Newhall, *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, No. CV 95-01671-JO*, at 302 (D. Or. Jan. 8, 1999); see also id. at 290 ("Up until January of '95, I felt relatively diluted by the–you know, in the pool of providers of abortion services. I didn't feel particularly visible to the people who were–you know, to the John Salvis of the world, you know. I sort of felt one of a big, big group."). Likewise, Dr. Warren Martin Hern, another plaintiff, testified that when he heard he was on the list, "I was terrified ....It's hard to describe the feeling that–that you are on a list of people to–who have been brought to public attention in this way. I felt that this was a–a list of doctors to be killed." Testimony of Warren Martin Hern, Planned Parenthood, No. CV 95-01671-JO, at 625 (Jan. 11, 1999).

Were the instruction taken literally, the jury could have concluded that ACLA's statements contained "a serious expression of intent to harm," not because they authorized or directly threatened violence, but because they put the doctors in harm's way. However, the First Amendment does not permit the imposition of liability on that basis.

C. Although the jury instruction was ambiguous, we need not decide whether the ambiguity was so great as to require us to set aside the verdict. Even if the jury drew only the permissible inference, we must evaluate the record for ourselves to ensure that the judgment did not trespass on the defendants' First Amendment rights. Specifically, we must determine whether ACLA's statements could reasonably be construed as saying that ACLA (or its agents) would physically harm doctors who did not stop performing abortions. Because the district court rejected the First Amendment claim, we conduct a *de novo* review of both the law and the relevant facts. *See Lovell*, 90 F.3d at 370. The question therefore is not whether the facts found below are supported by the record but whether we, looking at the record with fresh eyes, make the same findings. If we disagree with the district court, our findings prevail. *See*

Eastwood v. National Enquirer, Inc., 123 F.3d 1249, 1252 (9th Cir. 1997).

We start by noting that none of the statements ACLA is accused of making mention violence at all. While pungent, even highly offensive, ACLA's statements carefully avoid threatening the doctors with harm "in the sense that there are no 'quotable quotes' calling for violence against the targeted providers." *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 23 F. Supp. 2d 1182, 1186 (D. Or. 1998). Instead, ACLA offers rewards to those who take nonviolent measures against the doctors, such as seeking the revocation of their medical licenses and protesting their activities. One poster talks about persuading Crist to "turn from his child killing," but stops short of suggesting any violence or other criminal conduct against him. The website seeks to gather information about abortion supporters and encourages others to do the same. ACLA also speaks of future "perfectly legal" Nuremberg-like trials, to be held at a time when public opinion has turned in its favor.

We recognize that the words actually used are not dispositive, because a threat may be inferred from the context in which the statements are made. [n13] However, there are at least two kinds of ambiguity that context can resolve. The first deals with statements that call for violence on their face, but are unclear as to *who* is to commit the violent acts–the speaker or a third party. All cases of which we are aware fall into this category: They hold that, where the speaker expressly mentions future violence, context can make it clear that it is the speaker himself who means to carry out the threat. *See note* 13 *supra*.

A more difficult problem arises when the statements, like the ones here, not only fail to threaten violence by the defendants, but fail to mention future violence at all. [n14] Can context supply the violent message that language alone leaves out? While no case answers this question, we note important theoretical objections to stretching context so far. Context, after all, is often not of the speaker's making. For example, the district court in this case admitted evidence of numerous acts of violence surrounding the abortion

controversy, almost none of them committed by the defendants or anyone connected with them. [n15] In the jury's eyes, then, defendants' statements were infused with a violent meaning, at least in part, because of the actions of others. If this were a permissible inference, it could have a highly chilling effect on public debate on any cause where somebody, somewhere has committed a violent act in connection with that cause. A party who does not intend to threaten harm, nor say anything at all suggesting violence, would risk liability by speaking out in the midst of a highly charged environment.

In considering whether context could import a violent meaning to ACLA's non-violent statements, we deem it highly significant that all the statements were made in the context of public discourse, not in direct personal communications. Although the First Amendment does not protect all forms of public speech, such as statements inciting violence or an imminent panic, the public nature of the speech bears heavily upon whether it could be interpreted as a threat. [n16] As we held in *McCalden v. California Library Ass'n*, 955 F.2d 1214 (9th Cir. 1992), "public speeches advocating violence" are given substantially more leeway under the First Amendment than "privately communicated threats." *Id.* at 1222; *see also Orozco-Santillan*, 903 F.2d at 1265 ("Although a threat must be 'distinguished from what is constitutionally protected speech, 'this is not a case involving statements with a political message." (quoting *Watts v. United States*, 394 U.S. 705, 707, 22 L. Ed. 2d 664, 89 S. Ct. 1399 (1969) (per curiam)).

There are two reasons for this distinction: First, what may be hyperbole in a public speech may be understood (and intended) as a threat if communicated directly to the person threatened, whether face-to-face, by telephone or by letter. In targeting the recipient personally, the speaker leaves no doubt that he is sending the recipient a message of some sort. In contrast, typical political statements at rallies or through the media are far more diffuse in their focus because they are generally intended, at least in part, to shore up political support for the speaker's position.

Second, and more importantly, speech made through the normal channels of group communication, and concerning matters of public policy, is given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment. *See Claiborne Hardware*, 458 U.S. at 926-27 ("Since respondents would impose liability on the basis of a public address–which predominantly contained highly charged political rhetoric lying at the core of the First Amendment–we approach this suggested basis of liability with extreme care."). With respect to such speech, we must defer to the well-recognized principle that political statements are inherently prone to exaggeration and hyperbole. *See Watts*, 394 U.S. at 708 ("The language of the political arena ...is often vituperative, abusive, and inexact. "(citation omitted)). If political discourse is to rally public opinion and challenge conventional thinking, it cannot be subdued. Nor may we saddle political speakers with implications their words do not literally convey but are later "discovered "by judges and juries with the benefit of hindsight and by reference to facts over which the speaker has no control.

Our guiding light, once again, is *Claiborne Hardware*. There, Charles Evers expressly threatened violence when he warned the boycott violators that "we're gonna break your damn necks," and that the sheriff could not protect them from retribution. *See* 458 U.S. at 902. Evers made these statements at a time when there had already been violence against the boycott breakers. Evers did not himself identify specific individuals to be disciplined, but his associates had gathered and published the names, and there's no doubt that the black community in the small Mississippi county where the boycott was taking place knew whom Evers was talking about. The Supreme Court held that, despite his express call for violence, and the context of actual violence, Evers's statements were protected, because they were quintessentially political statements made at a public rally, rather than directly to his targets. *See id.* at 928-29.

If Charles Evers's speech was protected by the First Amendment, then ACLA's speech is also protected. [n17] Like Evers, ACLA did not communicate privately with its targets;

the statements were made in public fora. And, while ACLA named its targets, it said nothing about planning to harm them; indeed, it did not even call on others to do so. This stands in contrast to the words of Charles Evers, who explicitly warned his targets that they would suffer broken necks and other physical harm. Under the standard of *Claiborne Hardware*, the jury's verdict cannot stand. [n18]

VACATED and REMANDED with instructions that the district court dissolve the injunction and enter judgment for the defendants on all counts.

Footnotes

* Following oral argument, we deferred submission and encouraged the parties to settle. We asked the parties to notify us within 48 hours if negotiations were progressing and more time was needed. Having heard nothing by close of business on September 14, 2000, we ordered the case submitted.

** The Honorable William W Schwarzer, United States Senior District Judge for the Northern District of California, sitting by designation.

n1 Plaintiffs did not sue Horsley, but the district court concluded that Horsley was an agent of ACLA and other defendants as well as a co-conspirator. *See Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1152 (D. Or. 1999). In addition, the court found that the defendants came up with the idea for the webpage and sent Horsley much of its content. *See id.* at 1152-53.

n2 In addition to plaintiffs, the Nuremberg Files website identifies dozens of clinic employees and public figures as abortion supporters (and future war crimes defendants), including six current members of the Supreme Court,. Bill Clinton, Al Gore, Janet Reno, Jack Kevorkian, C. Everett Koop, Mary Tyler Moore, Whoopi Goldberg and, for reasons unknown, Retired Justice Byron White. *See Roe*, 410 U.S. at 121 (White, J., dissenting).

n3 Specifically, they alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, the Oregon Racketeer Influenced and Corrupt Organizations Act, Or. Rev. Stat. § 166.720, and the state tort of intentional infliction of emotional distress. The state law claims were abandoned before trial, and the district court submitted to the jury only the FACE and RICO claims.

n4 We call statements "true threats" to distinguish them from statements that are threatening on their face but could only be understood, under the circumstances, as hyperbole or jokes. For example, in *Watts v. United States*, 394 U.S. 705, 22 L. Ed. 2d 664, 89 S. Ct. 1399 (1969) (per curiam), the Supreme Court held that the defendant's statement that "if they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," was not a true threat. *Id.* at 706, 708 (internal quotation marks and citation omitted). It was instead "political hyperbole ...a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708 (internal quotation marks omitted).

n5 The jury held that defendants Michael Bray and Donald Treshman were not liable under RICO. Although the district court had previously found Bray in default because of his refusal to comply with discovery orders, the court later set aside the default and entered judgment against Bray on the FACE claim based on the verdict.

n6 In No. 99-35333, Paul deParrie, a non-party, moves to intervene in the appeal because he was enjoined as an employee and agent of one of the defendant organizations, the Advocates for Life Ministries (ALM). *See* Fed. R. Civ. P. 65(d). DeParrie relies on *Keith v. Volpe*, 118 F.3d 1386, 1391 (9th Cir. 1997), but that case dealt with a situation where a non-party sought to appeal a judgment that would not otherwise have been appealed by the parties. The question then was whether someone who is not a party might take the legally operative step of filing a notice of appeal. Here, all of the losing parties have appealed and deParrie's proposed participation is in the nature of an amicus. We therefore construe deParrie's motion as one to participate as an amicus

curiae and grant it.

In No. 99-35320 and No. 99-35405, a former defendant, Monica Migliorino Miller, filed a notice of appeal of the injunction with which the district court ordered she be served. At plaintiffs' request, the district court had dismissed Miller from the suit before trial and so she was not herself enjoined. The injunction applies to her only insofar as she is an agent or employee of defendants, and so she has no independent standing to appeal. Her notice of appeal is therefore ordered stricken.

n7 If such statements were unprotected threats, newspapers might face liability for publishing stories that increased the likelihood that readers would harm particular persons, for example by disclosing the identity of mobsters in hiding or convicted child molesters. This would permit the imposition of liability for the mere publication of news, dramatically undercutting the freedom constitutionally accorded to the press. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) (recognizing the need to protect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

n8 It is not unlawful to say things that frighten other people. A doctor who discloses an adverse prognosis often instills fear in the patient and his family; predicting a future event– "That bus is about to hit your child!"–can cause the listener intense apprehension. Yet such statements are not (and cannot be made) unlawful. Nor does it matter that the speaker makes the statement for the very purpose of causing fear. Let's say your malicious neighbor sees your house is burning. He calls you at work and announces: "Your house is on fire!" This may scare you–it may have no other purpose–yet it is lawful because it is speech and does not fall within one of the narrow categories the Supreme Court has held is unprotected under the First Amendment.

The matter is more complicated where the speech is intended to intimidate the listener into changing his conduct. Blackmail and extortion–the threat that the speaker will say

or do something unpleasant unless you take, or refrain from taking, certain actions–are not constitutionally protected. *See, e.g., Watts*, 394 U.S. 705, 22 L. Ed. 2d 664, 89 S. Ct. 1399. On the other hand, the statement, "If you smoke cigarettes you will die of lung cancer," is protected, even though its purpose is to scare you into quitting smoking. So is, "If you mess around with Tom's girlfriend, he'll break your legs," unless the speaker is sent by Tom. The difference is this: In the case of blackmail and extortion, you are given to understand that, unless you do what's asked of you, the speaker himself (or someone acting on his behalf) will bring about that which you abhor; in the other examples, the speaker has no control over the adverse consequences and merely predicts what is likely to happen if you act (or refrain from acting) in a particular way.

n9 Our case law has not been entirely consistent as to whether a speaker may be penalized for negligently uttering a threat or whether he must have specifically intended to threaten. *Compare Orozco-Santillan*, 903 F.2d at 1265 ("Whether a particular statement may properly be considered to be a threat is governed by an objective standard–whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."), with *United States v. Gilbert (Gilbert I)*, 813 F.2d 1523, 1529 (9th Cir. 1987) ("[*Gilbert*] correctly identifies the element of intent specified in section 3631 as the determinative factor separating protected expression from unprotected criminal behavior ....The statute's requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech. "(citation omitted)). While we believe that *Gilbert I* states the correct rule, the result here is the same under either standard. We therefore presume that the less speech-protective standard of *Orozco-Santillan* applies.

n10 We need not decide here whether the First Amendment would protect defendants from a suit for invasion of privacy, because plaintiffs do not claim damages based solely on the publication of private facts, namely their addresses and telephone numbers. *Cf. Anderson v. Fisher*

Broadcasting Cos., 300 Ore. 452, 712 P.2d 803, 807 (Or. 1986) (recognizing a tort for invasion of privacy when the tortfeasor has the specific intent to cause plaintiff severe mental or emotional distress and such conduct exceeds "the farthest reach of socially tolerable behavior").

n11 *See, e.g., Lovell*, 90 F.3d at 369 (student told administrator, "I'm going to shoot you"); *Melugin v. Hames*, 38 F.3d 1478, 1481 (9th Cir. 1994) (civil defendant sent letter to judge threatening to kill him); *Orozco-Santillan*, 903 F.2d at 1264 (arrestee threatened INS agent at his arrest and during subsequent phone calls); *United States v. Gilbert (Gilbert II)*, 884 F.2d 454, 455-56 (9th Cir. 1989) (white supremacist mailed a letter to the head of an inter-racial adoption agency, condemning her occupation and enclosing posters suggesting he would commit violence against inter-racial couples and ethnic minorities); *United States v. Mitchell*, 812 F.2d 1250, 1252 (9th Cir. 1987) (defendant told Secret Service agents he was going to kill them and the President); *Roy v. United States*, 416 F.2d 874, 875 (9th Cir. 1969) (marine called the White House and said he was going to kill the President). The instruction continues to be good law in cases where the source of the threatened violence is not an issue.

n12 In December 1994, John Salvi killed two clinic workers and wounded five others in attacks on two clinics in Brookline, Massachusetts; Salvi later fired shots at a clinic in Norfolk, Virginia before he was apprehended. Salvi is not a defendant in this case.

n13 *See, e.g., Orozco-Santillan*, 903 F.2d at 1265 ("Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners."); *Gilbert II*, 884 F.2d at 457 ("The fact that a threat is subtle does not make it less of a threat."). Other courts have also recognized that ambiguous language may still constitute a threat. *See United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (holding that an anti-abortion activist, who had previously used force against clinic personnel, threatened Dr. Crist when she screamed at him on numerous occasions that he could be killed if he kept on committing

abortions); *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994) (finding a threat where defendant sent letters to a federal appellate judge suggesting he would use force against the panel unless it reversed its decision); *United States v. Khorrami*, 895 F.2d 1186, 1193 (7th Cir. 1990) (holding that defendant made a threat by repeatedly making anti-Semitic phone calls to a Jewish organization and sending it letters calling for the deaths of Israeli leaders).

n14 The defendants come closest to suggesting violence on the webpage, where the names of the murdered doctors are stricken and the wounded ones are grayed. We read the striketype and graying as the equivalent of marking "killed" or "wounded" next to the names. This clearly reports past violent acts and may connote approval. But it cannot fairly be read as calling for future violence against the several hundred other doctors, politicians, judges and celebrities on the list; otherwise any statement approving past violence could automatically be construed as calling for future violence.

n15 Defendants objected to admission of much of this evidence and press their objections on appeal. Given our ruling on the merits, we need not pass on this issue. Nothing we say, therefore, should be construed as approving the district court's evidentiary rulings.

n16 The doctors do not claim that ACLA's speech amounted to incitement. To rise to incitement, the speech must be capable of "producing imminent lawless action." *Brandenburg*, 395 U.S. at 447. Here, the statements were made at public rallies, far away from the doctors, and before an audience that included members of the press. ACLA offered rewards to those who stopped the doctors at "some indefinite future time," *Hess*, 414 U.S. at 108, and the ambiguous message was hardly what one would say to incite others to immediately break the law. Finally, the statements were not in fact followed by acts of violence. *See Claiborne Hardware*, 458 U.S. at 928 ("Had [the speech] been followed by acts of violence, a substantial question would be presented" as to incitement, but "when such appeals do not incite lawless action, they must be regarded as protected speech.").

n17 We cannot distinguish this case from *Claiborne Hardware* on the ground that the speech is aimed at impeding abortions, which are constitutionally protected against government interference. The speech in *Claiborne Hardware* likewise sought to prevent lawful conduct–black citizens' patronage of white stores–that the government could not ban without violating the Equal Protection Clause. The Constitution protects rights against government interference; it doesn't justify the suppression of private speech that tries to deter people from exercising those rights.

n18 For precisely the same reasons, the district court could not enjoin the defendants based upon such protected statements. We must therefore vacate the injunction as well.

Civil No. 95-1671-JO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; ET AL.,
Plaintiffs,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ET AL.,
Defendants.

March 16, 1999, Decided

March 16, 1999, Filed

COUNSEL:
For PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE INC, PORTLAND FEMINIST WOMEN'S HEALTH CENTER, ROBERT CRIST, WARREN M HERN, ELIZABETH NEWHALL, JAMES NEWHALL, Plaintiffs: Carol J Bernick, Davis Wright Tremaine, Portland, OR.

For PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE INC, PORTLAND FEMINIST WOMEN'S HEALTH CENTER, ROBERT CRIST, WARREN M HERN, ELIZABETH NEWHALL, JAMES NEWHALL, Plaintiffs: Stephen S Walters, Stoel Rives, Portland, OR.

For PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE INC, PORTLAND FEMINIST WOMEN'S HEALTH CENTER, ROBERT CRIST, WARREN M HERN, ELIZABETH NEWHALL, JAMES NEWHALL,

Plaintiffs: Elizabeth Maringer, Maria T Vullo, Martin London, Paul Weiss Rifkind Wharton & Garrison, New York, NY.

For PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE INC, Plaintiff: Roger Evans, Planned Parenthood Federation of America Inc, New York, NY.

For AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, ANDREW BURNETT, DAVID CRANE, MICHAEL DODDS, CATHERINE RAMEY, DAWN MARIE STOVER, Defendants: David T Daulton, Berean Law Group PC, Norfolk, VA.

For AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, TIMOTHY PAUL DRESTE, JOSEPH L FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, CHARLES WYSONG, Defendants: Kevin L Gibbs, Olmstead Gibbs & Harper, Seattle, WA.

For AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, TIMOTHY PAUL DRESTE, JOSEPH L FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, DONALD TRESHMAN, CHARLES WYSONG, Defendants: Mark Renart Peck, Law Office of Mark Renart Peck, Morristown, NJ.

For AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, TIMOTHY PAUL DRESTE, JOSEPH L FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, CHARLES WYSONG, Defendants: William D Bailey, Lake Oswego, OR.

For TIMOTHY PAUL DRESTE, JOSEPH L FOREMAN, CHARLES WYSONG, Defendants: Mark Belz, Belz & Jones PC, St Louis, MO.

For TIMOTHY PAUL DRESTE, JOSEPH L FOREMAN, CHARLES WYSONG, Defendants: Michael R Hirsh, Hirsh & Heuser PC, Canton, GA.

For MICHAEL DODDS, Defendant: Michael P Tierney, John M McSherry, Legal Center For The Defense Of Life, New York, NY.

For MICHAEL DODDS, DONALD TRESHMAN, Defendants: James M Bendell, Law Office of James M Bendell, Port Townsend, WA.

For MICHAEL DODDS, Defendant: Norman L Lindstedt, Norman L Lindstedt, PC, Portland, OR.

For MICHAEL DODDS, STEPHEN P MEARS, MONICA MIGLIORINO MILLER, DONALD TRESHMAN, Defendants: Richard J Traynor, Law Office Richard J Traynor, Morristown, NJ.

For DONALD TRESHMAN, Defendant: Chris Ferrara, American Catholic Lawyers Association, Fairfield, NJ.

For AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON, Amicus: Michael H Simon, Chin See Ming, Perkins Coie, Portland, OR.

HENRY KANE, Movant, Pro se, Beaverton, OR.

PAUL DEPARRIE, Movant, Pro se, Portland, OR.

JUDGES:
ROBERT E. JONES, U.S. District Judge.

OPINIONBY:
ROBERT E. JONES

OPINION:

AMENDED ORDER AND PERMANENT INJUNCTION

Plaintiffs, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center, doing business as All Women's Health Services (collectively "plaintiffs"), commenced this action seeking a permanent injunction, damages and other relief. The trial before the jury having been concluded, and the jury having found that defendants did issue true threats against plaintiffs, and this Court having found that plaintiffs are without an adequate remedy at law, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. *The Threats*

A. *The "Deadly Dozen" Poster*

1. The Deadly Dozen poster, trial exhibit 1, is a true threat to bodily harm, assault, or kill one or more of the plaintiffs.

2. The Deadly Dozen poster was created by the American Coalition of Life Activists ("ACLA") and first published in or around Washington, D.C. on January 22, 1995. (Ex. 1; Tr. 1352, 1385)

3. Defendants Michael Bray, Andrew Burnett, David Crane, Michael Dodds, Joseph Foreman, C. Roy McMillan, Bruce Murch, Catherine Ramey, Dawn Stover, Donald Treshman and Charles Wysong attended the ACLA event where the Deadly Dozen poster was unveiled. (Answer of defendants American Coalition of Life Activists, Advocates for Life Ministries, Michael Bray, Andrew Burnett, David Crane, Timothy Dreste, C. Roy McMillan, Bruce Murch, Catherine Ramey, Dawn Stover and Charles Wysong ("ACLA Answer") ¶ 40; Tr. 1254, 1356, 1493-94) Defendant Dreste ratified the poster's release. (Tr. 1170, 2486) Defendant Advocates for Life Ministries ("ALM") republished the poster in its magazine *Life Advocate*. (Ex. 3) Defendant Murch

republished the poster in his publication, *Salt & Light*. (Ex. 2) Defendants also republished the poster at later ACLA events.

4. The Deadly Dozen poster was unveiled at the event in blown-up form. (Tr. 1357)

5. The Deadly Dozen poster lists thirteen physicians. Three of the plaintiffs are specifically named with their place of residence: Dr. Elizabeth Newhall, Dr. James Newhall and Dr. Warren Hern. (ACLA Answer ¶ 41; Ex. 1; Tr. 1254-55)

6. In addition to their names and the city in which they reside, the Deadly Dozen poster lists the home address of Drs. James and Elizabeth Newhall. (ACLA Answer ¶ 41; Ex. 1; Tr. 1254-55)

7. The Deadly Dozen poster lists the name and home address of Dr. George Kabacy, a doctor who at the time provided abortions at plaintiff, Planned Parenthood of the Columbia/Willamette, Inc. ("Planned Parenthood"). (Ex. 1; Tr. 477)

8. Also listed on the Deadly Dozen poster is Dr. Joseph Booker of Jackson, Mississippi, who had been a target of ACLA protests during ACLA's first event in Jackson, Mississippi, in August 1994. (Ex. 1, Tr. 970-71)

9. Also listed on the Deadly Dozen poster is the name and address of Dr. George Tiller of Kansas. Dr. Tiller was shot in both arms in August 1993 by Shelley Shannon of Grants Pass, Oregon. Shannon had been to Wichita before, and had protested Dr. Tiller, along with defendants Andrew Burnett and Catherine Ramey. (Ex. 51) At the time Shannon shot Dr. Tiller, she had in her possession copies of *Life Advocate* magazine (published by defendant ALM) with information about Dr. Tiller. (Tr. 1080) Among those who signed a petition supporting the acquittal of Shannon were defendants ALM, Bray, Burnett, Dodds and McMillan. (Ex. 52; Tr. 1491) Defendant Dawn Stover publicly supported Shannon on national television. (Tr. 2456) In his October 1993 editorial for *Life Advocate*, defendant Burnett stated "Shelley was a courageous women [sic] that we were very proud to be associated with." (Ex. 51)

10. The day after the Deadly Dozen poster was released, the Federal Bureau of Investigation contacted the doctors named on the list, notified them of their need to take safety measures and offered 24-hour personal protection of the U.S. Marshal Service for the doctors and their families. (Tr. 568-69) Calls from the U.S. Marshals and other law enforcement followed. (Tr. 236, 624) Plaintiffs heeded these warnings.

B. *The Poster of Dr. Robert Crist*

11. The Poster of Dr. Robert Crist, trial exhibit 5, is a true threat to bodily harm, assault or kill one or more of the plaintiffs.

12. The Poster of Dr. Robert Crist displays a photograph of Dr. Crist, and his home and business addresses. (ACLA Answer ¶ 48b; Ex. 5; Tr. 1257)

13. The Poster of Dr. Crist was created and first published by ACLA during its event in St. Louis, Missouri in August 1995. (ACLA Answer ¶ 48b; Ex. 5; Tr. 608, 899, 1257)

14. Defendants Andrew Burnett, David Crane, Timothy Dreste, C. Roy McMillan, Catherine Ramey, Dawn Stover and Charles Wysong attended the ACLA event where the Poster of Dr. Crist was unveiled. The other defendants assisted in planning the event and the poster and/or ratified its release. (ACLA Answer ¶ 47c; Tr. 1228, 1257, 1494-95)

15. Immediately after the poster was released, Dr. Crist was informed by the St. Louis police that he should take additional security precautions. (Tr. 1104) Dr. Crist followed that advice. (Tr. 1110)

C. *The Nuremberg Files*

16. The "Nuremberg Files," trial exhibits 7 and 9, are a true threat to bodily harm, assault or kill one or more of the plaintiffs.

17. The Nuremberg Files list the names and contain personal information on abortion providers, clinic employees and clinic owners, law enforcement officials involved in securing access to abortion services, judges, politicians, and abortion rights supporters. (Ex. 7, Tr. 2283)

18. Dr. Robert Crist appears in the Nuremberg Files. (Exs. 7A, 7B, 7C; Tr. 1116-17)

19. Dr. Warren Hern appears in the Nuremberg Files. (Exs. 7A, 7B, 7C) A photograph of Dr. Warren Hern appears in the Nuremberg Files along with the address and telephone numbers of his medical offices. (Exs. 7A, 7E; Tr. 2296)

20. Dr. Elizabeth Newhall appears in the Nuremberg Files. (Exs. 7A, 7B, 7C; Tr. 286)

21. Dr. James Newhall appears in the Nuremberg Files. (Exs. 7A, 7B, 7C)

22. At one time, defendants possessed a hard copy version of the Nuremberg Files, including one of Dr. James Newhall. (Ex. 9) These files have since been destroyed by defendants and/or their agents during the course of this lawsuit and were therefore not produced to plaintiffs.

23. The names of several doctors and employees of plaintiff Planned Parenthood appear in the Nuremberg Files: Dr. George Kabacy (also named on the Deadly Dozen poster), Dr. Mark Nichols (Planned Parenthood's medical director), Dr. Gary Prohaska (a former chair of Planned Parenthood's medical committee), and Allie Stickney (Planned Parenthood's former executive director). (Exs. 7A, 7B, 7C; Tr. 529)

24. The (now former) executive director of plaintiff Portland Feminist Women's Health Center ("Portland Feminist"), Jude Hanzo, is listed and featured in the Nuremberg Files. (Ex. 7A, 7D) The hard copy version of this file has since been destroyed by defendants and/or their agents during the course of this lawsuit and was therefore not produced to plaintiffs.

25. The names of doctors and clinic workers and security personnel who have been killed during attacks on abortion clinics are listed in the Nuremberg Files with strikes through their names. (Ex. 7A; Tr. 2258) Those wounded, such as Dr. Tiller, are shaded in gray. (Ex. 7A; Tr. 2258)

26. The FBI contacted plaintiffs to notify them that they appear in the Nuremberg Files and advised them to take safety precautions. (Ex. 28; Tr. 286-87, 1523)

27. The Nuremberg Files were unveiled in hard copy form by ACLA, with the assistance of Paul deParrie, at ACLA's January 1996 event in Washington, D.C. (Exs. 80, 81, 82; Tr. 1362-63)

28. Defendants Burnett and Crane organized the project with deParrie prior to the event. (Tr. 2815) The other defendants approved of the project and agreed to its commission.

29. Defendants Bray, Burnett, Crane, Dodds, Dreste and Wysong attended the January 1996 ACLA event at which the Nuremberg Files were unveiled. (Tr. 608, 970, 1361, 1495, 2053, 2729) Defendant Murch planned to attend, but at the last minute was unable to attend. (Tr. 2604-05)

30. At the January 1996 ACLA event, a "box" of Nuremberg Files was displayed. (Tr. 2066)

31. The Nuremberg File of Dr. Prohaska was displayed at the January 1996 ACLA Event. (Ex. 4)

32. Soon after the January 1996 ACLA event, Neal Horsley received hard copy Nuremberg Files from Paul deParrie. (Ex. 4; Tr. 424, 2245) Horsley received two shipments of at least 22 hard copy files to be posted on the Internet. (Tr. 2329) These files included the files of Dr. Prohaska and Ms. Hanzo. The defendants have not identified by name the other hard copy files that existed but have since been destroyed.

33. The cover letter on the first shipment of files bore ACLA's name and P.O. box and summarized the Nuremberg Files project. (Tr. 2331) Horsley copied that information when he placed the Nuremberg Files on the Internet.

34. ACLA's name appeared on the Nuremberg Files Internet website in its initial format. (Ex. 7B)

35. The Nuremberg Files website makes it clear that any information kept by ACLA and/or Neal Horsley will be kept away from legal authorities. The website declares: "the

evidence collected will be forwarded to several secure locations so that pro-abortion forces will not be able to destroy the evidence and prevent its future use." (Ex. 7B) This statement remained on later versions of the website. (Ex. 7A)

36. After Horsley published the ACLA Nuremberg Files on the Internet, Horsley shipped the hard copy files to an undisclosed location at the request of Paul deParrie. (Tr. 2371)

37. None of the defendants produced any Nuremberg Files during the course of discovery in this lawsuit, despite the fact that they were in defendants possession after this lawsuit was filed in October 1995 and were called for by discovery requests. Neither Horsley nor deParrie produced any Nuremberg Files pursuant to the subpoenas served on them. (Tr. 2374, 2875-76)

II. *Defendants Released Their Threats into a Known Atmosphere of Violence Against Abortion Providers*

38. On March 10, 1993, Dr. David Gunn was shot and killed outside of the Pensacola, Florida clinic where he performed abortions. (ACLA Answer ¶ 55a; Tr. 1258, 2474) Michael Griffin has been convicted of this murder.

39. Prior to his murder, Dr. Gunn's name, photograph and other personal identifying information appeared on WANTED posters. (ACLA Answer ¶ 53; Exs. 11, 12, 13; Tr. 939, 1257, 1497)

40. By January 1995, plaintiffs were aware of this murder and the posters that preceded it. (Exs. 133, 144; Tr. 365, 1508)

41. By January 1995, defendants knew of the murder of Dr. David Gunn and of the posters that preceded his death. (Exs. 57, 133, 144; Tr. 1508)

42. Defendants Michael Bray, Andrew Burnett, David Crane, Michael Dodds, Joseph Foreman, C. Roy McMillan, Catherine Ramey and Dawn Stover signed a "Defensive Action" petition circulated by Paul Hill declaring the murder

of Dr. Gunn justifiable and calling for Griffin's acquittal. (Ex. 41A-41D)

43. Defendant Donald Treshman issued a press release on the morning Dr. Gunn was murdered, announcing a fund supporting Michael Griffin. (Ex. 40)

44. Within days of the murder of Dr. Gunn, defendant Timothy Dreste stood outside of an abortion clinic where Dr. Yogendra Shah performed abortions and held up a sign that read: "Dr. Shah, do you feel under the Gunn?" (Ex. 149)

45. On August 21, 1993, Dr. George Patterson, an abortion provider, was shot and killed in Mobile, Alabama. (Foreman Answer ¶ 58; Tr. 356, 1508)

46. Prior to Dr. Patterson's murder, his name, physical description and address were published on a "WANTED" poster. (ACLA Answer ¶ 56a; Ex. 14; Tr. 356, 1258, 1508)

47. Defendants knew of the murder of Dr. Patterson. (Ex. 51)

48. Plaintiffs knew of the murder of Dr. Patterson and the poster that preceded it. (Tr. 357, 1197, 1508)

49. On July 29, 1994, Dr. John Bayard Britton, the doctor who had replaced Dr. Gunn and provided abortions at the same clinic where Dr. Gunn was murdered, was shot and killed along with his volunteer escort, James Barrett, while entering another Pensacola clinic. (ACLA Answer ¶ 68a; Ex. 60; Tr. 1132, 1259, 2503) Mrs. Barrett, James Barrett's wife, was wounded in the attack. (ACLA Answer ¶ 68a; Tr. 761, 1259)

50. Prior to his murder, Dr. Britton's name, photograph and physical description appeared on "unWANTED" posters. (ACLA Answer ¶ 66; Exs. 15, 16, 17; Tr. 771-75, 1258) These posters contained the phrase "Crimes Against Humanity," also found on the Deadly Dozen poster, the Poster of Dr. Robert Crist and the Nuremberg Files. (Exs. 1, 5, 7, 15, 16, 17)

51. Prior to these murders, defendants Burnett and Ramey visited John Burt in Pensacola, Florida. Burt had created the poster of Dr. Gunn and was one of the persons who had also

prepared the posters of Dr. Britton along with Paul Hill. They discussed "wanted" posters at this meeting. (Exs. 57, 144; Tr. 785-88) Hill and Burt were videotaped taking photographs for the poster of Dr. Britton. (Ex. 109; Tr. 763-72)

52. Paul Hill has been convicted of the murder of Dr. Britton and Mr. Barrett, and the attempted murder of Mrs. Barrett. (Exs. 60, 109; Tr. 763-64; 770-76, 786)

53. By January 1995, defendants were aware of the murder of Dr. Britton and the posters that preceded it. (Exs. 57, 58, 60, 144; Tr. 947, 958)

54. By January 1995, plaintiffs were aware of the murder of Dr. Britton and the posters that preceded it. (Ex. 144; Tr. 241, 648-49, 1142)

55. Defendants Bray, Burnett, Crane, McMillan, Ramey and Stover signed a petition calling for the acquittal of Paul Hill. (ACLA Answer ¶ 67; Ex. 61; Tr. 1259) The petition was identical to that circulated by Hill in support of Michael Griffin. (Ex. 41)

56. Defendant McMillan, three months after the murder of Dr. Britton, called Paul Hill "a patriot," and a "wonderful man" who had "fired the first shots in this war." (Tr. 791)

57. ALM and its editor-in-chief, Paul deParrie, publicly praised Paul Hill after he was convicted of murder and sentenced to death and encouraged others to follow his lead: "The man's a hero. May his tribe increase." (Ex. 65)

58. These murders were not isolated events. Violence in the anti-abortion movement continued, as chronicled in defendant ALM's magazine *Life Advocate*.

59. In August 1993, just two days prior to the murder of Dr. Patterson, Dr. George Tiller was shot in both arms by Shelley Shannon. (Tr. 1079) Shelley Shannon was a close friend and associate of the defendants. (Tr. 874, 1079-81) Shannon also later pleaded guilty to arson and butyric acid attacks on eight abortion facilities, including Portland Feminist's Eugene, Oregon clinic. (ACLA Answer ¶ 62a; Tr. 1079, 1261)

60. In November 1994, in Vancouver, Canada, Dr. Garson Romalis, an abortion provider, was shot by a sniper with a high-powered rifle at close range. He was having breakfast in his home at the time. (Tr. 637)

61. By January 1995, plaintiffs were aware of the sniper shooting of Dr. Romalis. (Tr. 637-38)

62. By January 1995, defendants were aware of the shooting as well. Defendant Treshman praised the shooting of Dr. Romalis on national television, stating "I would say that that was certainly the superb tactic. It was certainly far better than anything that was seen in the States because the shooting was done in such a way that the perpetrator got away. I would think more abortionists would quit as a result of it." (Ex. 113)

63. Soon thereafter, on December 30, 1994, John Salvi murdered two clinic workers and wounded five others at two clinics in Brookline, Massachusetts. One of the clinics in Brookline was a Planned Parenthood clinic. (Tr. 290-91, 407)

64. Immediately following the shootings in Massachusetts, Salvi drove to Norfolk, Virginia and fired shots into the windows of the Hillcrest Clinic in Norfolk. (Tr. 407, 1339)

65. Defendant David Crane was present outside of the Hillcrest Clinic on the morning John Salvi fired the shots. (Tr. 1340-41)

66. Defendant Michael Bray had been convicted and served four years in federal prison for conspiracy to bomb seven abortion facilities including the Hillcrest Clinic. (Ex. 744; Tr. 1260)

67. More physicians who perform abortions in Canada have been shot by snipers since the sniper shooting of Dr. Romalis.

68. In January 1998, a bomb in Birmingham, Alabama killed an off-duty police officer and maimed a nurse who worked at the clinic.

69. Defendant McMillan referred to the Birmingham bombing as "a righteous act." (Ex. 114) Defendant Bray

likewise defended this violence on national television. (Ex. 112)

70. In October 1998, in his home outside of Buffalo, New York, Dr. Barnett Slepian, a doctor who performed abortions, was shot and killed by a sniper. (Tr. 636-37)

71. Dr. Slepian's name is crossed out on the Nuremberg Files website. (Ex. 7A; Tr. 2258-59)

72. Violence against abortion providers has continued through today.

III. *The Defendants*

A. *American Coalition of Life Activists ("ACLA")*

73. ACLA is a coalition of people and organizations that held its first official event in August 1994 in Jackson, Mississippi. ACLA was formed in 1994 following a meeting in Chicago in April 1994 during which there was a split in the pro-life movement over the use of force. Defendants, many of whom had signed the Defensive Action petition approving the murder of Dr. Gunn, refused to commit to non-violence. Because they advocated the use of "force" and justifiable homicide, they were no longer allowed to be leaders of Operation Rescue and therefore agreed to form a new organization that became ACLA. (ACLA Answer ¶ 17c; Tr. 837, 1246, 1474, 1561-64)

74. ACLA's position on violence against abortion providers is clear. In the words of ACLA co-founder and regional director and ALM executive director, defendant Andrew Burnett, "if someone was to condemn any violence against abortion, they probably wouldn't have felt comfortable working with us." (Tr. 829-30)

75. ACLA was founded by defendants Andrew Burnett, Joseph Foreman and C. Roy McMillan. (ACLA Answer ¶¶ 20a, 24a, 25a; Tr. 1247-48, 1251-52)

76. Defendant David Crane is the president and national director of ACLA. (ACLA Answer ¶ 2; Tr. 1245)

77. Defendant Andrew Burnett is the Regional Director of ACLA for the Northwest region. (ACLA Answer ¶ 20a; Tr. 1247-48)

78. Defendant Timothy Dreste is the Regional Director of ACLA for the Central Midwest Region. (ACLA Answer ¶ 22a; Tr. 1251)

79. Defendant Michael Dodds was the Regional Director of ACLA for the South Central Region during the relevant time, and remains an active member of ACLA. (ACLA Answer ¶ 23a; Tr. 1251)

80. Defendant Bruce Murch was a regional director of ACLA for the Northeast Region during the relevant time, and remains an active member of ACLA. (ACLA Answer ¶ 27a; Tr. 1252)

81. Defendant Donald Treshman was a regional director of ACLA for the Southwest region during the relevant time, and remains an active member of ACLA. (ACLA Answer ¶ 31a; Tr. 1253)

82. Defendant Charles Wysong is the Regional Director of ACLA for the Southeast region. (ACLA Answer ¶ 32a; Tr. 1253)

83. Defendant Joseph Foreman drafted the ACLA Constitution. (Tr. 2203)

84. None of the defendants has ever disapproved of or disassociated with the goals or activities of ACLA.

85. In January 1995, ACLA unveiled the Deadly Dozen poster at its event in the Washington, D.C. area. (ACLA Answer ¶ 40a; Ex. 2; Tr. 1254)

86. In August 1995, ACLA unveiled the Poster of Dr. Robert Crist at its event in St. Louis. (ACLA Answer ¶ 48b; Ex. 5; Tr. 1257)

87. At the St. Louis event, ACLA also unveiled and circulated posters of other abortion providers and reproductive health facilities. (Exs. 6, 18, 19, 409; Tr. 1173)

88. Prior to its St. Louis event, ACLA prepared to issue a "Contract on the American Abortion Industry." (Ex. 76)

89. In January 1996, ACLA unveiled the Nuremberg Files, which were subsequently posted on the Internet. (Exs. 80, 81; Tr. 1180, 1361, 1556, 1560)

90. ACLA republished the Deadly Dozen poster at its events in August 1995 and January 1996, and included it in its mailings (Tr. 1180, 1361, 2445)

91. ACLA uses intimidation as a means of interfering with the provision of reproductive health services.

92. Defendant American Coalition of Life Activists ("ACLA") violated or conspired to violate FACE. (Verdict at 3)

93. ACLA is an enterprise that engaged in a pattern of racketeering activity under RICO.

94. ACLA injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 3)

B. *Advocates for Life Ministries ("ALM").*

95. ALM was involved in the formation of ACLA, coordinates its Northwest region, and is an active ACLA member. (ACLA Answer ¶ 18b; Tr. 838, 1247)

96. ALM provided its telephone and fax numbers and address for ACLA mailings. (Tr. 836, 1055, 1057-58)

97. ALM publishes *Life Advocate* magazine. (ACLA Answer ¶ 18c; Tr. 1247)

98. Andrew Burnett is the executive director of ALM and the publisher of *Life Advocate.* (ACLA Answer ¶ 20b; Tr. 793, 863, 1051, 1248)

99. Defendants Catherine Ramey and Dawn Stover are associate directors of ALM. (ACLA Answer ¶¶ 29a, 30a; Tr. 979, 1252-53, 2429)

100. *Life Advocate's* editor-in-chief is Paul deParrie. (Tr. 1051, 2511)

101. ALM published defendant Michael Bray's book, *A Time to Kill.* (Exs. 63, 744; Tr. 936-37)

102. According to ALM, defendant Bray's book "shows the connection between the [justifiable homicide] position and clinic destruction and the shootings of abortionists." (Ex. 63)

103. In *Life Advocate*, ALM advertises and sells defendant Bray's "EXECUTE Murderers, Abortionists" bumper stickers. (Exs. 10, 66)

104. Subscribers have asked to be removed from *Life Advocate's* mailing list because of the magazine's endorsement of the use of force. (Exs. 51, 66, 67, 68; Tr. 1090)

105. ALM republished the Deadly Dozen poster in the March 1995 issue of *Life Advocate*. (Ex. 3)

106. ALM has featured Michael Griffin, Paul Hill and Shelley Shannon on the cover of *Life Advocate* magazine. (Exs. 51, 52, 60; Tr. 916)

107. Shelley Shannon had in her possession several issues of *Life Advocate* featuring articles and photographs of Dr. George Tiller when she shot him in August 1993. (Ex. 45, 47; Tr. 1079-80) Shannon had the magazines so she could identify Dr. Tiller, his vehicle and his clinic. (Tr. 1080)

108. ALM endorsed Shelley Shannon's shooting of Dr. Tiller. (ACLA Answer ¶ 62b; Ex. 51; Tr. 1261)

109. Defendant Ramey, associate director of ALM, destroyed ALM documents and deleted material from ALM's computers since this litigation commenced and plaintiffs served requests for the production of documents on both ALM and Ramey. (Tr. 2513-14)

110. The September 1993 *Life Advocate* noted that an "unwanted poster" of Dr. Britton was in the process of being prepared by Paul Hill and others, and described the activities of Hill and others in identifying and surveilling Dr. Britton. (Ex. 57)

111. In that same article, ALM commented on the murder of Dr. David Gunn, noting that it "sent waves of fear through the ranks of abortion providers across the country. As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." (Ex. 57)

112. Multiple telephone calls with other defendants to and from ALM's offices took place during the time surrounding ACLA's April 1995 event in Wichita, Kansas. (Ex. 94)

113. Multiple telephone calls with other defendants to and from ALM's office took place during the time surrounding ACLA's August 1995 event, at which the Poster of Dr. Robert Crist was unveiled. (Ex. 94)

114. Multiple telephone calls with other defendants to and from ALM's office took place during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

115. ALM advertised and promoted the White Rose Banquets in *Life Advocate*. (Ex. 79, 84; Tr. 969)

116. ALM advertised and promoted other ACLA events in *Life Advocate*.

117. ALM maintained the hard copy Nuremberg Files at the *Life Advocate* offices during the course of this lawsuit. (Ex. 9; Tr. 978, 2887)

118. ALM uses intimidation as a means of interfering with the provision of reproductive health services.

119. ALM has never disassociated itself with, nor expressed disapproval of, any of ACLA's activities.

120. Defendant Advocates for Life Ministries ("ALM") violated or conspired to violate FACE. (Verdict at 4)

121. ALM violated or conspired to violate RICO. (Verdict at 4)

122. ALM injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 4)

C. *Michael Bray*

123. Defendant Bray attended the ACLA planning meeting in Bowie, Maryland in November 1994. (Tr. 2029)

124. Defendant Bray attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen list was unveiled. (ACLA Answer ¶ 40b; Tr. 967, 1254, 1284)

125. At that event, defendant Bray sold copies of his book, *A Time to Kill*. (Tr. 2622)

126. Defendant Bray's book was published by ALM and commissioned by defendant Andrew Burnett. (Tr. 1071)

127. Defendant Bray had multiple telephone discussions with other defendants during the time surrounding ACLA's August 1995 event, at which the Poster of Dr. Robert Crist was unveiled. (Ex. 94)

128. Defendant Bray attended an ACLA planning meeting in Bowie, Maryland in November 1995 prior to ACLA's January 1996 event at which the Nuremberg Files were unveiled. (Tr. 2029)

129. Defendant Bray had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

130. Defendant Bray hosted the annual White Rose Banquets in January 1996 and January 1997 during which ACLA activities were discussed. (Tr. 609-10, 1495)

131. The White Rose Banquet is part of the ACLA January event each year. (Ex. 78, 79, 80, 81, 82, 84)

132. The White Rose Banquet honors people who have been imprisoned for their violent anti-abortion activities. (Tr. 1373)

133. The White Rose calendar, published by defendant Murch and distributed at the White Rose Banquet, contains photos and otherwise commemorates anti-abortion violence and its perpetrators. (Ex. 83)

134. Defendant Bray publishes a newsletter, *Capitol Area Christian News*. (Tr. 601)

135. Defendant Bray, in his September 1993 newsletter, wrote an article describing "unwanted" posters of Dr. John Britton. (Ex. 58; Tr. 611)

136. Defendant Bray signed Paul Hill's petition calling for the acquittal of Shelley Shannon. (Ex. 52)

137. Defendant Bray drafted and signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Ex. 41; Tr. 604)

138. Defendant Bray drafted and signed an identical justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61; Tr. 605)

139. In June 1993, defendant Bray spoke at an event in Oklahoma City sponsored by defendant Treshman in favor of the use of force. (Tr. 894-95)

140. At the Oklahoma City event, defendant Bray displayed a sign reading "EXECUTE Murderers, Abortionists." (Ex. 304; Tr. 894-95)

141. Defendant Bray also created a bumper sticker that states "EXECUTE Murderers, Abortionists." (Ex. 10) He advertises the bumper sticker in *Life Advocate* as well as in *Capitol Area Christian News*. (Exs. 10, 66)

142. Defendant Bray advocates and promotes the use of force against abortion providers. In a televised interview, he stated "There are times when there is justified killing. We hear of terminating pregnancies. Terminating abortionists, I think is appropriate. Use level language. Human beings, the unborn is a human being. If we are going to speak of terminating pregnancies, we can speak of terminating abortionists." (Ex. 111)

143. In the September 1993 issue of his *Capitol Area Christian News*, Bray discussed one doctor's decision to quit performing abortions following a "Not Wanted" poster prepared and circulated by defendant David Crane and republished in Bray's publication. Bray wrote that although the doctor "declined to give the reason for his decision, it is clear to all who possess faculties capable of inductive analysis: he was bothered and afraid." (Ex. 58)

144. Defendant Bray placed the words "Army of God" on a sign at the Hillcrest Clinic in Norfolk, Virginia, an abortion facility bombed by Bray. (ACLA Answer ¶ 78; Tr. 603)

145. Defendant Bray discussed his copy *Army of God Manual* in the November 1995 *Life Advocate*. In that article,

Bray discusses how he "traded" his copy of the *Army of God Manual* for a U.S. Army manual on sniper training. (Ex. 88)

146. Defendant Bray has refused to commit to stop using force in connection with his anti-abortion activities. (Tr. 604)

147. Defendant Bray stated in USA Today: "Anyone who truly believes that the slaughter of children is what we have with abortion could go out and shoot an abortion provider." (Ex. 87)

148. Defendant Bray was present when the Nuremberg Files were unveiled at the January 1996 ACLA event. (Tr. 608)

149. Defendant Bray was part of the discussions with Neal Horsley and others about placing the Nuremberg Files on the Internet. (Tr. 2239)

150. Defendant Bray, in his Fall 1997 issue of *Capitol Area Christian News*, informed his readers that Neal Horsley was collecting names and information for the Nuremberg Files. (Ex. 90)

151. Defendant Bray sees benefits from the atmosphere of violence to which he contributed. In the November 1995 issue of *Life Advocate*, he wrote: "The fact that 3% of the population believes that lethal action against abortionists is justifiable . . . probably 'instills fear' enough to make life-preserving decisions . . . . The fear of the sniper can influence him to consider the end of his life and the judgment to come." (Ex. 88)

152. Defendant Bray uses intimidation as a means of interfering with the provision of reproductive health services.

153. Defendant Bray has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

154. Defendant Michael Bray violated or conspired to violate FACE. (Verdict at 5)

155. Defendant Bray injured plaintiffs in the amount of compensatory damages awarded by the jury. (Verdict at 5)

156. Defendant Bray acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

D. *Andrew Burnett*

157. Defendant Burnett is the executive director of defendant ALM. (Tr. 865)

158. Defendant Burnett is a co-founder of ACLA. (ACLA Answer ¶ 20a; Tr. 794-95, 827, 1247-48)

159. Defendant Burnett is a regional director of ACLA. (ACLA Answer ¶ 20a; Tr. 863, 1247-48)

160. Defendant Burnett, together with defendant Joseph Foreman, while in Portland, Oregon, drafted a letter announcing the formation ACLA and circulated it on ACLA letterhead. (Tr. 833)

161. Defendant Burnett signed Paul Hill's justifiable homicide petition calling for the acquittal of Shelley Shannon. (Ex. 52)

162. Defendant Burnett signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Exs. 41A, B, C, D)

163. Defendant Burnett signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61)

164. Defendant Burnett is the publisher of *Life Advocate* magazine, *A Time To Kill*, by Michael Bray, and *In Defense of Others*, by Catherine Ramey. (ACLA Answer ¶ 20c; Tr. 793, 937, 1071, 1248)

165. Defendant Burnett has protested at both the home and offices of Dr. Elizabeth Newhall and Dr. James Newhall. (Tr. 892)

166. In June 1998, defendant Burnett violated an injunction ordering him to stay away from Downtown Women's Health Center, the clinic where plaintiffs Dr. Elizabeth Newhall and Dr. James Newhall perform abortions. Defendant Burnett was caught on camera in the hallway outside the Newhalls' office. (Ex. 37, 323; Tr. 856-61)

167. Prior to the entry of that injunction, during a protest outside of the Downtown Women's Center, Burnett attempted to grab the ankles and trip Jane White, co-owner and co-director of Downtown Women's Center. At the time, Ms. White was seven months pregnant. (Tr. 1182, 1185-86)

168. Defendant Burnett attended the event sponsored by defendant Treshman in Oklahoma City in June 1993, at which Burnett and Bray spoke in favor of the use of force. (Ex. 320, Tr. 894)

169. Defendant Burnett attended a meeting in Melbourne, Florida in October 1993 at which the use of force was discussed among the defendants. (Tr. 1471-72)

170. Defendant Burnett attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1169)

171. Defendant Burnett attended a planning meeting for the formation of ACLA in the summer of 1994 in St. Louis with defendants Dreste and Foreman. (Tr. 1170)

172. Defendant Burnett attended ACLA's first official event in Jackson, Mississippi in August 1994. (ACLA Answer ¶ 70; Tr. 970, 1254)

173. Defendant Burnett attended the ACLA planning meeting where the Deadly Dozen poster was discussed, in Bowie, Maryland in November 1994. (Tr. 1070)

174. Defendant Burnett participated in an ACLA conference call prior to the January 1995 meeting, to plan the Deadly Dozen poster. (Tr. 2028)

175. Defendant Burnett had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1995 event, at which the Deadly Dozen poster was unveiled. (Ex. 94)

176. Defendant Burnett provided the names and addresses of Drs. Elizabeth and James Newhall and Dr. George Kabacy for the Deadly Dozen poster and helped prepare the poster. (Tr. 956)

177. Defendant Burnett also asked Paul deParrie to provide names for the list. (Tr. 2854)

178. Defendant Burnett attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254, 1646)

179. On the day of the release of the Deadly Dozen poster, defendant Burnett publicly stated, referring to Paul Hill: "Looking objectively, I can't say what he did was wrong. I can't say he stepped outside the bounds of protection that I hope I would get if I were in danger of being killed." (ACLA Answer ¶ 42b; Tr. 1255)

180. Defendant Burnett attended a meeting in St. Louis with defendants Crane and Dreste in the summer of 1995 to plan the August 1995 ACLA event in St. Louis. (Tr. 899, 968)

181. Defendant Burnett attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Ex. 409; Tr. 898)

182. Defendant Burnett attended the ACLA event in Washington, D.C. in January 1996 at which the Nuremberg Files were unveiled. (Tr. 970) Burnett was once in possession of hard copy Nuremberg Files, including one of plaintiff James Newhall. (Ex. 9) Burnett did not produce any of these documents during the course of this litigation although required by plaintiffs' document requests and this Court's discovery orders.

183. Defendant Burnett attended the 1996 White Rose Banquet. (Tr. 1496)

184. Defendant Burnett attended the ACLA event in Washington, D.C. in January 1997. (Tr. 1176)

185. Defendant Burnett understands the danger that "Wanted" or "Guilty" posters pose to the lives of those who provide abortions. He testified in this regard, "I mean, if I was an abortionist, I would be afraid." (Tr. 964)

186. Defendant Burnett himself has been tempted to act violently. He said, "I would have to say that anybody who's involved in pro-life activism has been, you know, confronted with that possibility." (Ex. 108)

187. Defendant Burnett uses intimidation as a means of interfering with the provision of reproductive health services.

188. Defendant Burnett has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

189. Defendant Andrew Burnett violated or conspired to violate FACE. (Verdict at 6)

190. Defendant Burnett violated or conspired to violate RICO. (Verdict at 6)

191. Defendant Burnett injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 6)

192. Defendant Burnett acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

E. *David Crane*

193. Defendant Crane is the national director of ACLA. (ACLA Answer ¶ 21a; Tr. 1250-51, 1268)

194. Defendant Crane attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1326)

195. Defendant Crane allied himself with Paul Hill at the Chicago meeting and endorsed the use of deadly force. (Tr. 1326)

196. Defendant Crane signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Ex. 41C)

197. Defendant Crane signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61)

198. Defendant Crane was involved in the formation of ACLA. (Tr. 834)

199. Defendant Crane attended ACLA's first official event in Jackson, Mississippi in August 1994. (ACLA Answer ¶ 70; Tr. 1254)

200. Defendant Crane attended the ACLA organizational meeting in Bowie, Maryland in November 1994, to plan the January 1995 event. (Tr. 2008, 2029)

201. Defendant Crane participated in the ACLA conference call to plan the Deadly Dozen poster. (Tr. 2028)

202. Defendant Crane had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1995 event, at which the Deadly Dozen poster was unveiled. (Ex. 94)

203. Defendant Crane prepared the Deadly Dozen poster and solicited names and other information for the poster from other defendants. (Tr. 1385)

204. Defendant Crane unveiled the Deadly Dozen poster at the ACLA event in January 1995 in blown-up form. (Tr. 1352, 1357)

205. Defendant Crane and ACLA republished the Deadly Dozen poster on several occasions after learning that the physicians on the list had been provided U.S. Marshal protection after the poster was published. (Tr. 1445-46)

206. Defendant Crane attended and spoke at the ACLA event in Wichita, Kansas in April 1995. (Tr. 1299-1300)

207. Defendant Crane attended a meeting in St. Louis in the summer of 1995 to plan the August ACLA event in St. Louis. (Tr. 1299)

208. Defendant Crane distributed a letter inviting people to attend the St. Louis ACLA event. (Tr. 1308)

209. Defendant Crane organized and attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Ex. 409; Tr. 1257, 1303)

210. Defendant Crane assisted in the preparation of the Poster of Dr. Robert Crist. (Tr. 1303, 1312)

211. Defendant Crane had multiple telephone discussions with other defendants during the time surrounding ACLA's

January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

212. Defendant Crane presented the Nuremberg Files at an ACLA event in January 1996. (Tr. 1361)

213. Defendant Crane met with defendant Charles Wysong and with Paul deParrie and Neal Horsley to plan the Nuremberg Files Internet project. (Tr. 2682)

214. Defendant Crane attended the 1996 White Rose Banquet. (Tr. 1175, 1376)

215. Defendant Crane organized and attended the ACLA event in Washington, D.C. in January 1997. (Tr. 1176)

216. Defendant Crane attended the 1997 White Rose Banquet. (Tr. 1176; 1363-64)

217. Defendant Crane had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1997 event. (Ex. 94)

218. Defendant Crane had created "Wanted" or "Guilty"-style posters prior to the Deadly Dozen poster, including a poster of Dr. Abraham Anderson. After that poster, Dr. Anderson stopped performing abortions because he feared for his personal security and that of his family. (Tr. 1288-89)

219. Defendant Crane admits that there is no difference in impact between posters headed "Wanted" and those headed "Guilty." (Tr. 1352)

220. Defendant Crane once was the subject of a "Wanted" poster of himself and Paul Hill. Crane kept this Wanted poster in his "death threat" file. (Ex. 21; Tr. 1320)

221. Defendant Crane uses intimidation as a means of interfering with the provision of reproductive health services.

222. Defendant Crane has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

223. Defendant David Crane violated or conspired to violate FACE. (Verdict at 7)

224. Defendant Crane violated or conspired to violate RICO. (Verdict at 7)

225. Defendant Crane injured each plaintiff in the amount found in compensatory damages by the jury. (Verdict at 7)

226. Defendant Crane acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

F. *Michael Dodds*

227. Defendant Dodds is a regional director of ACLA. (ACLA Answer ¶ 23a; Tr. 1251, 1946)

228. Defendant Dodds attended the ACLA meeting in Bowie, Maryland in November 1994, to plan the January 1995 event. (Tr. 1945)

229. Defendant Dodds participated in the ACLA conference call to plan the Deadly Dozen poster. (Tr. 1820)

230. Defendant Dodds attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (Tr. 1947)

231. Defendant Dodds provided Dr. George Tiller's name for the Deadly Dozen poster. (Tr. 1493)

232. Defendant Dodds endorsed Shelley Shannon's 1993 shooting of Dr. Tiller. Dodds signed a petition calling for her acquittal and solicited donations for Shannon's legal defense fund. (Ex. 52; Tr. 1491)

233. Defendant Dodds signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Exs. 41B, 41C, 41D)

234. Defendant Dodds had multiple telephone discussions with other defendants during the time surrounding ACLA's April 1995 event in Wichita, Kansas. (Ex. 94)

235. Defendant Dodds hosted and spoke about "New Aggressive Boycott Methods" at the ACLA event in Wichita, Kansas in April 1995. (Tr. 1965, 2044-5)

236. Defendant Dodds excluded the media from that part of the Wichita ACLA event because "we basically want to rely on . . . a lack of awareness on the individual's part . . . they are vulnerable in this area so we can gain information." (Ex. 110; Tr. 2044-46)

237. The Nuremberg Files were discussed at the ACLA Witchita event. (Tr. 2082)

238. Defendant Dodds ratified the release of the Poster of Dr. Robert Crist. (Tr. 1494-95)

239. Defendant Dodds attended a planning meeting of ACLA in Bowie, Maryland in November 1995. (Tr. 2032)

240. Defendant Dodds participated in an ACLA conference call in late 1995, to plan the January 1996 event. (Tr. 1495)

241. Defendant Dodds had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

242. Defendant Dodds attended the ACLA event in Washington, D.C. in January 1996 at which the Nuremberg Files were unveiled. (Tr. 2053)

243. Defendant Dodds attended the 1996 White Rose Banquet wearing a badge reading "Lieutenant Colonel AOG." AOG stands for Army of God, the militant anti-abortion group that published a tract on making lethal weapons for the fight against abortion. (Tr. 2074)

244. Defendant Dodds uses intimidation as a means of interfering with the provision of reproductive health services.

245. Defendant Dodds has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

246. Defendant Michael Dodds violated or conspired to violate FACE. (Verdict at 8)

247. Defendant Dodds violated or conspired to violate RICO. (Verdict at 8)

248. Defendant Dodds injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 8)

249. Defendant Dodds acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

G. *Timothy Paul Dreste*

250. Defendant Dreste is a regional director of ACLA. (ACLA Answer ¶ 22a; Tr. 864, 1251, 1270)

251. Defendant Dreste attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1169)

252. At or around the time of that meeting, Dreste and defendants Foreman and Burnett met with approximately 100-120 others and discussed forming a new organization which became ACLA. (Tr. 1169)

253. Defendant Dreste attended the planning meeting for the formation of ACLA in the summer of 1994 with defendants Foreman and Burnett. (Tr. 1170)

254. Defendant Dreste contributed money to Paul Hill's support fund. (Tr. 1169)

255. Defendant Dreste approved of the Deadly Dozen poster. Dreste regretted that Dr. Robert Crist was not one of the doctors named on the poster. (Tr. 1170)

256. Defendant Dreste attended the meeting in the summer of 1995 to plan the August 1995 ACLA event in St. Louis. (Tr. 899)

257. Defendant Dreste emceed the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (Tr. 1173)

258. Defendant Dreste continues to circulate the Poster of Dr. Robert Crist. (Tr. 1173; ¶ 482 *infra*)

259. Defendant Dreste also was involved in the creation and publication at the August 1995 ACLA event of a poster of Reproductive Health Services, the clinic where Dr. Crist works, and posters of Dr. John Stopple, Dr. Yogendra Shah

and the clinics where those doctors performed abortions. (Exs. 6, 18, 19; Tr. 1173)

260. Defendant Dreste had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

261. Defendant Dreste attended the ACLA event in Washington, D.C. in January 1996 at which the Nuremberg Files were unveiled. (Tr. 1175)

262. At that event, defendant Dreste received a $ 500 simulated check for getting Dr. John Stopple to stop performing abortions just months after ACLA put Dr. Stopple on a poster nearly identical to the Poster of Dr. Crist. (Ex. 18; Tr. 2679-80, 2701-02) The poster was unveiled at the same August 1995 ACLA event at which the Poster of Dr. Crist was unveiled. That fake check was presented by defendant Crane. (Tr. 2703)

263. Defendant Dreste attended the ACLA event in Washington, D.C. in January 1997. (Tr. 1175)

264. Defendant Dreste attended the 1996 and 1997 White Rose Banquets. (Tr. 1175-76)

265. When defendant Dreste protests outside St. Louis abortion clinics, he often wears a hat adorned with shotgun shells. (Tr. 1176)

266. One week after the murder of Dr. Gunn, Dreste stood outside of a St. Louis abortion clinic where Dr. Yogendra Shah performed abortions and held up a sign "Dr. Shah, do you feel under the Gunn?" (Ex. 149)

267. Defendant Dreste uses intimidation as a means of interfering with the provision of reproductive health services.

268. Defendant Dreste has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

269. Defendant Timothy Dreste violated or conspired to violate FACE. (Verdict at 9)

270. Defendant Dreste violated or conspired to violate RICO. (Verdict at 9)

271. Defendant Dreste injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 9)

272. Defendant Dreste acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

H. *Joseph Foreman*

273. Defendant Foreman is a co-founder of ACLA. (ACLA Answer ¶ 24a; Tr. 1251, 2193)

274. Defendant Foreman helped draft and signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Ex. 41A; Tr. 2208)

275. Defendant Foreman attended a meeting in Melbourne, Florida in October 1993 at which the use of force was discussed among defendants. (Tr. 1471-72)

276. Defendant Foreman organized the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 2126)

277. Defendant Foreman sent a letter to approximately 500 people announcing the formation of ACLA and encouraging participation. (Tr. 2193)

278. Defendant Foreman drafted the ACLA constitution. (Tr. 2202-03)

279. Defendant Foreman attended a planning meeting for the formation of ACLA in the summer of 1994. (Tr. 2198-2201)

280. Defendant Foreman planned and attended ACLA's first official event in Jackson, Mississippi in August 1994. (Tr. 2134-37)

281. Defendant Foreman attended the ACLA organizational meeting in Bowie, Maryland in November 1994. (Tr. 2029)

282. Defendant Foreman attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254)

283. Defendant Foreman attended and spoke at the ACLA event in Wichita, Kansas in April 1995 where Nuremberg Files were discussed. (Tr. 1301, 1494, 2140)

284. Defendant Foreman had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

285. Defendant Foreman has been found by a federal judge to have "bumped, shoved, and slashed or pushed Dr. Morris"; "Dr. Morris sustained some cuts and scratches. The incident also caused both Dr. and Mrs. Morris to suffer mental anguish and stress." Dr. Morris is a doctor in California who performs abortions. (Ex. 474; Tr. 2184)

286. Defendant Foreman uses intimidation as a means of interfering with the provision of reproductive health services.

287. Defendant Foreman has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

288. Defendant Joseph Foreman violated or conspired to violate FACE. (Verdict at 10)

289. Defendant Foreman violated or conspired to violate RICO. (Verdict at 10)

290. Defendant Foreman injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 10)

291. Defendant Foreman acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

I. *Charles Roy McMillan*

292. Defendant McMillan is a co-founder and prominent member of ACLA. (ACLA Answer ¶ 25a; Tr. 125[2])

293. Defendant McMillan, in Life Advocate magazine and elsewhere, lied about having served as an infantry officer in

Vietnam. In the article entitled, "Two Killers in this House, and We Sleep Fine, Thank You," McMillan asserted that he had killed hundreds of his "enemies" in Vietnam. (Tr. 1228) McMillan made these statements to intimidate abortion providers.

294. Defendant McMillan attended a meeting in Melbourne, Florida in October 1993 at which the use of force was discussed among defendants. (Tr. 1471-72)

295. Defendant McMillan attended a dinner at Paul Hill's house on the eve of Michael Griffin's trial for the murder of Dr. Gunn. Defendants Bray, Burnett and Crane were there as well. All agreed that the murder of Dr. Gunn was "justifiable homicide." (Tr. 1221)

296. Defendant McMillan signed Paul Hill's petition calling for the acquittal of Shelley Shannon. (Ex. 52)

297. Defendant McMillan signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Exs. 41A, B, C, D; Tr. 1222)

298. Defendant McMillan signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61)

299. McMillan has publicly stated that it is justifiable and righteous not only to kill physicians who provide abortions, but also anyone else who is involved in the provision of abortion or supports abortion rights. (Tr. 1225)

300. Defendant McMillan attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1472)

301. Defendant McMillan hosted ACLA's first official event in Jackson, Mississippi in August 1994, where Dr. Joseph Booker was targeted. (Tr. 971, 2203)

302. Defendant McMillan had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1995 event, at which the Deadly Dozen poster was unveiled. (Ex. 94)

303. Defendant McMillan attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254)

304. Defendant McMillan provided the name of Dr. Joseph Booker to David Crane for the Deadly Dozen poster. (Tr. 1228)

305. Defendant McMillan attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Tr. 1257)

306. Defendant McMillan invoked the Fifth Amendment when asked if he had ever damaged an abortion clinic. (Tr. 1228-29)

307. Defendant McMillan advocates and promotes violence against abortion providers and abortion clinic workers. He has stated "those employees choose to work in a place where human beings are being killed. They choose to enter the killing zone and they need to understand and be warned that people who choose to kill and be accessories to murder may very well have violence done against them to stop the violence they are perpetrating on human beings in the womb." (Answer ¶ 79; Tr. 1255)

308. Defendant McMillan praised the bombing of a Birmingham, Alabama abortion clinic where a police officer was killed and a nurse was critically injured, declaring, "I think it was a righteous act." (Ex. 114)

309. Defendant McMillan, in discussing the antiabortion movement, stated "more violence is inevitable and it is righteous. It wouldn't bother me if every abortionist in the country today fell dead from a bullet." (ACLA Answer ¶ 45a; Tr. 1224, 1256)

310. Defendant McMillan believes violence is justified. He believes in "killing people in just wars, and there is a war in the womb." (Tr. 1225)

311. Defendant McMillan, three months after the murder of Dr. Britton, called Paul Hill "a patriot," and a "wonderful man" who had "fired the first shots in this war." (Tr. 791)

312. Defendant McMillan believes it is acceptable to shoot a pregnant abortion provider because "if you have to sacrifice an innocent to save many, it would be alright." (Tr. 1225)

313. Defendant McMillan believes it would be justifiable to kill the President and the Justices on the U.S. Supreme Court who support abortion rights. (Tr. 1225)

314. Defendant McMillan uses intimidation as a means of interfering with the provision of reproductive health services.

315. Defendant McMillan has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

316. Defendant Charles Roy McMillan violated or conspired to violate FACE. (Verdict at 11)

317. Defendant McMillan violated or conspired to violate RICO. (Verdict at 11)

318. Defendant McMillan injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 11)

319. Defendant McMillan acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

J. *Bruce Murch*

320. Defendant Murch is a regional director of ACLA. (ACLA Answer ¶ 27a; Tr. 1252, 2641)

321. Defendant Murch saved in his files a document that states "abortion clinics should be destroyed." (Ex. 454)

322. Defendant Murch has stated that the murder of Dr. Gunn was justifiable homicide. (Tr. 2716)

323. Defendant Murch attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 2576)

324. Defendant Murch had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1995 event, at which the Deadly Dozen poster was unveiled. (Ex. 94)

325. Defendant Murch attended and spoke at the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254, 2592)

326. Defendant Murch provided the names and addresses of the two doctors from the Northeast region for the Deadly Dozen poster. (Tr. 2592)

327. Defendant Murch republished the Deadly Dozen poster in his newsletter *Salt & Light* after being made aware that physicians on this poster had been provided U.S. Marshal protection. He circulated his newsletter with the Deadly Dozen poster to 700 people. (Ex. 2; Tr. 2625)

328. Defendant Murch attended the meeting in St. Louis in the summer of 1995 to plan the ACLA event in St. Louis in August 1995. (Tr. 1171)

329. Defendant Murch ratified the release of the Poster of Dr. Robert Crist. (Tr. 2644)

330. Defendant Murch attended the ACLA planning meeting in Bowie, Maryland in November 1995. (Tr. 2586)

331. Defendant Murch printed the 1996 White Rose calendar. (Ex. 83; Tr. 2607)

332. Defendant Murch also printed Michael Bray's newsletter, *Capitol Area Christian News*.

333. Defendant Murch planned to attend the January 1996 ACLA event where the Nuremberg Files were unveiled, but at the last minute was unable to attend. (Tr. 2604-05)

334. Defendant Murch compared himself and ACLA to the militant wing of the black power movement that advocated "violent overthrow by blacks," in contrast to the pacifist wing of the civil rights movement led by Dr. Martin Luther King, Jr. (Tr. 2632)

335. Defendant Murch believes that there is a difference between the use of force and violence. He considers the use of "force" legitimate. (Tr. 2365-66)

336. Defendant Murch uses intimidation as a means of interfering with the provision of reproductive health services.

337. Defendant Murch has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

338. Defendant Bruce Murch violated or conspired to violate FACE. (Verdict at 12)

339. Defendant Murch violated or conspired to violate RICO. (Verdict at 12)

340. Defendant Murch injured each plaintiff in the amount of compensatory damages awarded by the jury.

341. Defendant Murch acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

K. *Catherine Ramey*

342. Defendant Ramey is the associate director of defendant ALM and the associate editor of Life Advocate magazine. (ACLA Answer ¶¶ 29a, 29c; Tr. 1252, 2470)

343. Defendant Ramey edited Paul Hill's article in *Life Advocate* entitled "Who Killed the Innocent, Michael Griffin or David Gunn?" Ramey titled the final section of the article, "A Call to Specific Action," referring to killing abortion providers. (Ex. 320; Tr. 2501-02) The Paul Hill article was published the month before Shelley Shannon shot Dr. Tiller. (Tr. 2502)

344. Defendant Ramey wrote *In Defense of Others*.

345. Defendant Ramey edited defendant Bray's book, *A Time to Kill*.

346. Former ALM subscribers who read defendant Ramey's articles in *Life Advocate* concluded that she was advocating violence and perhaps was potentially violent herself. (Ex. 66)

347. Defendant Ramey signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Exs. 41A, B, C, D; Tr. 2503-04)

348. Defendant Ramey signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61; Tr. 2484)

349. Defendant Ramey is aware that certain people in the pro-life movement believe that Paul Hill and Michael Griffin

should be executed for what they did. She has stated that that position is shameful. (Tr. 1088)

350. Defendant Ramey attended the Chicago meeting in April 1994 out of which ACLA was formed. (Tr. 1472)

351. Defendant Ramey attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (Cite)

352. Defendant Ramey attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Tr. 899, 1257)

353. Ramey has promoted ACLA's message. (ACLA Answer ¶ 29g)

354. Defendant Ramey was in possession of the hard copy Nuremberg Files when they were maintained at ALM's offices during the course of this lawsuit, prior to their destruction. (Ex. 9)

355. Defendant Ramey, associate director of ALM, destroyed ALM documents and deleted material from ALM's computers since this litigation commenced and plaintiffs served requests for the production of documents on both ALM and Ramey. (Tr. 2513-14)

356. Defendant Ramey put on her car a bumper sticker that reads "EXECUTE Murderers/Abortionists" in the hope that her "car will exude a sense of justice that will cause a killer to question his security, temporal and eternal." (Ex. 379)

357. Defendant Ramey has stated that it is a good thing when abortion providers are shot. She declared "I would not hold out a Kleenex where an abortion provider shot. I – I think that there is an element of justice that is undeniable, and whether we recognize that legally or not . . . there is an element of justice." (Tr. 2505-06)

358. Defendant Ramey uses intimidation as a means of interfering with the provision of reproductive health services.

359. Defendant Ramey has never disassociated herself with, nor expressed disapproval of, any of ACLA's activities.

360. Defendant Catherine Ramey violated or conspired to violate FACE. (Verdict at 13)

361. Defendant Ramey violated or conspired to violate RICO. (Verdict at 13)

362. Defendant Ramey injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 13)

363. Defendant Ramey acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

L. *Dawn Stover*

364. Defendant Stover is the associate director of ALM. (ACLA Answer ¶ 30a; Tr. 1253, 2427)

365. Defendant Stover is an active participant in the activities of the Northwest Region of ACLA. (ACLA Answer ¶ 30a; Tr. 1253)

366. Defendant Stover attended a meeting in Melbourne, Florida in October 1993 at which the use of force was discussed among defendants. (Tr. 1471-2)

367. Defendant Stover attended the Chicago meeting in April 1994 out of which ACLA was formed. (Tr. 2451)

368. Defendant Stover attended the ACLA planning meeting in Bowie, Maryland in November 1994. (Tr. 1492-93)

369. Defendant Stover attended and was the media spokesperson for ACLA at the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254, 2431)

370. Defendant Stover attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (Tr. 2443)

371. Defendant Stover signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Ex. 41D)

372. Defendant Stover signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61)

373. Defendant Stover's parents-in-law, former subscribers to *Life Advocate*, concluded that ALM's staff, which includes Stover, supports murder of abortion providers. (Ex. 68)

374. Defendant Stover, after Shelley Shannon shot Dr. Tiller and Michael Griffin murdered Dr. Gunn, appeared with Paul Hill on ABC's *Nightline*. Stover stated: "I do believe that if her [Shelley Shannon's] intent was to save the children that George Tiller was going to kill that day, then Shelley, in my eyes, is a heroine." (Tr. 2455-56)

375. Defendant Stover uses intimidation as a means of interfering with the provision of reproductive health services.

376. Defendant Stover has never disassociated herself with, nor expressed disapproval of, any of ACLA's activities.

377. Defendant Dawn Stover violated or conspired to violate FACE. (Verdict at 14)

378. Defendant Stover violated or conspired to violate RICO. (Verdict at 14)

379. Defendant Stover injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 14)

380. Defendant Stover acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

M. *Donald Treshman*

381. Defendant Treshman is a regional director of ACLA. (ACLA Answer ¶ 31a; Tr. 1253, 1496)

382. In May 1993, when defendant Treshman learned that Dr. Robert Crist planned to practice medicine regularly at a Planned Parenthood clinic in Kansas City, Missouri, Treshman stated "we have been assured that he [Dr. Crist] will be monitored and that appropriate action will be taken." (ACLA Answer ¶ 59; Tr. 1260)

383. Defendant Treshman organized and sponsored an event in Oklahoma City in June 1993 at which Michael Bray and Andrew Burnett spoke in favor of the use of force. (Ex. 320; Tr. 894)

384. Defendant Treshman knew that before Dr. Gunn's murder in 1993, a wanted poster of Dr. Gunn had been circulated in Pensacola, Florida where Dr. Gunn lived and worked. (Tr. 1497)

385. On the morning of Dr. Gunn's murder, defendant Treshman issued a press release endorsing the murder and calling for donations for Michael Griffin's defense. (Ex. 40)

386. Defendant Treshman attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1472)

387. Defendant Treshman assisted in the formation of ACLA. (Tr. 834)

388. Defendant Treshman provided the name of Dr. Douglas Karpen for the Deadly Dozen poster. (Tr. 1493)

389. Defendant Treshman attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254, 1493)

390. Treshman's *Newsline* announced in January 1995 that immediately after release of the Deadly Dozen poster, the physicians on the poster were offered U.S. Marshal protection. (Ex. 71)

391. Defendant Treshman was a featured speaker at ACLA events. (Tr. 1300)

392. Defendant Treshman had multiple telephone discussions with other defendants during the time surrounding ACLA's August 1995 event, at which the Dr. Crist poster was unveiled. (Ex. 94)

393. Defendant Treshman received a letter from David Crane regarding the St. Louis event in August 1995 and the Poster of Dr. Robert Crist. (Ex. 76)

394. Defendant Treshman attended the ACLA planning meeting in November 1995. (Tr. 2645)

395. Defendant Treshman had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

396. Defendant Treshman advocates and promotes the use of force. In reference to the sniper shooting of abortion provider Dr. Garson Romalis in Canada in November 1994, Treshman stated "I would say that was certainly the superb tactic. It was certainly far better than anything that was seen in the States. Because the shooting was done in such a way that the perpetrator got away. I would think more abortionists would quit as a result of it." (Ex. 113)

397. Defendant Treshman uses intimidation as a means of interfering with the provision of reproductive health services.

398. Defendant Treshman has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

399. Defendant Donald Treshman violated or conspired to violate FACE. (Verdict at 15)

400. Defendant Treshman injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 15)

401. Defendant Treshman acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

N. *Charles Wysong*

402. Defendant Wysong is a regional director of ACLA. (ACLA Answer ¶ 32a; Tr. 1253, 2671)

403. Defendant Wysong attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (Tr. 1493-94)

404. Defendant Wysong provided defendant Crane with names of physicians for the Deadly Dozen poster. (Tr. 2671)

405. Defendant Wysong attended and spoke at the ACLA event in Wichita, Kansas in April 1995. (Tr. 2044, 2672)

406. Defendant Wysong attended the meeting in St. Louis in the summer of 1995 to plan the August 1995 ACLA event in St. Louis. (Tr. 968)

407. Defendant Wysong attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Ex. 409; Tr. 899, 1257)

408. Defendant Wysong prepared the Poster of Dr. Robert Crist with the assistance of defendants Burnett, Crane and Dreste. (Tr. 2736)

409. Defendant Wysong attended the ACLA planning meeting in Bowie, Maryland in November 1995. (Tr. 2645)

410. Defendant Wysong had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

411. Defendant Wysong attended and spoke at an ACLA event in Washington, D.C. in January 1996 at which the Nuremberg Files were unveiled. (Ex. 79; Tr. 2679)

412. Defendant Wysong attended the 1996 White Rose Banquet. (Tr. 2350)

413. Defendant Wysong met with defendant David Crane, Paul deParrie and Neal Horsley to plan the Nuremberg Files Internet project. (Tr. 2682)

414. Defendant Wysong attended and spoke at the ACLA event in Washington, D.C. in January 1997. (Tr. 1181)

415. Defendant Wysong attended the 1997 White Rose Banquet. (Tr. 1181, 2388)

416. Defendant Wysong was keenly aware of the effect posters such as the Deadly Dozen poster, the Poster of Dr. Robert Crist and the Nuremberg Files would have. He stated: "Listening to what abortionists said, abortionists who have quit the practice who are no longer killing babies but are now pro-life. They said the two things they feared the most were

being sued for malpractice and having their picture put on a poster." (Tr. 1178)

417. Defendant Wysong uses intimidation as a means of interfering with the provision of reproductive health services.

418. Defendant Wysong has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

419. Defendant Charles Wysong violated or conspired to violate FACE. (Verdict at 16)

420. Defendant Wysong violated or conspired to violate RICO. (Verdict at 16)

421. Defendant Wysong injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 16)

422. Defendant Wysong acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

IV. *Paul deParrie and Neal Horsley are Agents of the Defendants and Participated in the Destruction of Documents*

423. Paul deParrie is an agent of defendants ACLA, ALM and Burnett.

424. Neal Horsley is an agent of defendants ACLA, Michael Bray, Andrew Burnett, David Crane and Charles Wysong.

425. Horsley and deParrie conspired with the defendants in connection with the preparation and publication of the Nuremberg Files.

426. Horsley and deParrie conspired with defendants to obstruct justice by destroying or assisting in concealing the hard copy versions of Nuremberg Files so that they would not be available to plaintiffs or the Court.

427. DeParrie is the editor-in-chief of ALM's *Life Advocate* magazine, published by Andrew Burnett. (Tr. 2791-92)

DeParrie selects the news stories and commentaries that run in the magazine each month. (Tr. 2798)

428. DeParrie leads ALM events. (Tr. 2813-14, 2863)

429. DeParrie was once jailed for violating an injunction entered against ALM. (Tr. 2860)

430. DeParrie, at defendant Burnett's request, provided names of doctors for the Deadly Dozen Poster. (Tr. 2854)

431. DeParrie attended the January 1996 and January 1997 ACLA events in Washington D.C. (Tr. 2815-20).

432. DeParrie attended the White Rose Banquets in January 1996 and January 1997. (Tr. 2819-20)

433. DeParrie brought hard copy Nuremberg Files from ALM's offices to the January 1996 ACLA event, at which deParrie was a featured speaker and gave a presentation on the Nuremberg Files along with defendant Crane. (Tr. 2865)

434. DeParrie discussed creating the Nuremberg Files with defendants Burnett, Crane and Wysong. (Tr. 2815, 2819-20, 2682-83)

435. DeParrie, Neal Horsley and defendants Bray, Crane and Wysong conceived of putting the Nuremberg files on the Internet.

436. In 1997, as discovery in this case was proceeding, deParrie provided Neal Horsley's telephone number to David Crane and informed Horsley that Crane would be calling him about removing ACLA's name from the Nuremberg Files. (Tr. 2834)

437. The hard copy version of Dr. James Newhall's Nuremberg Files was broadcast on a television program that showed defendants Burnett and Ramey, along with Paul deParrie, compiling Dr. Newhall's file at defendant ALM's Portland offices. (Ex. 9)

438. Paul deParrie took the photographs of Dr. James Newhall and his home for the Nuremberg Files during an ALM protest outside of Dr. Newhall's home in late 1994. (Tr. 893, 2844)

439. DeParrie did not produce this or any other Nuremberg File (or any other file on abortion providers) in response to a subpoena calling for their production in this case. (Tr. 2875-76)

440. Horsley did not produce this or any other Nuremberg File (or any other file on abortion providers) in response to a subpoena calling for their production in this case. (Tr. 2374)

441. Horsley manages the Nuremberg Files on the Internet as an agent and co-conspirator of defendant. (Tr. 1556)

442. Horsley publishes defendant Bray's *Capitol Area Christian News* on his website. (Tr. 2239)

443. The Nuremberg Files are linked to *Life Advocate* on Horsley's website. (Ex. 8)

444. Horsley has testified inconsistently about whether he attended the 1996 or 1997 White Rose Banquet in order to offer his "services," to defendants. (Tr. 2238, 2335-36)

445. Horsley offered his website services specifically to defendants Crane and Bray. (Tr. 2349)

446. Defendant Bray announced at his White Rose Banquet that Horsley was developing websites. (Tr. 2239)

447. The Internet format for the Nuremberg Files was conceived by Crane, Wysong, deParrie and Horsley. (Tr. 2682-83)

448. Horsley did what he was told with regard to the hard copy and Internet versions of the Nuremberg Files. He stated, "When I work for someone, I do what they tell me to do, and I'm scrupulous in making sure that what I'm doing is in harmony with what they want." (Tr. 2250)

449. Soon after the ACLA event, Horsley received hard copies of the Nuremberg Files to be posted in the Internet. The cover letter with the files Horsley received contained ACLA's name and other text for the Nuremberg Files. (Tr. 2331)

450. Horsley and deParrie conspired to obstruct justice by destroying or assisting in concealing the hard copy versions of Nuremberg Files, in order to assist the defendants in this case.

451. Horsley shipped the hard copy files off to an undisclosed location at the request of deParrie, who did not want them discovered in this or any other litigation. "I think that these things could be seized from people's houses, under various kinds of court orders and stuff, and then it would be gone, and we wouldn't have any recourse . . . I don't want to know where it is, and I am just hoping that it will resurface if we ever get the chance to have [Nuremberg] trials." (Tr. 2891-92)

452. In sending the files to this undisclosed location, Horsley understood that "the best thing to do with them was to – to send them somewhere where nobody knew where they were, including me." (Tr. 2309) Horsley remained confused about why he should send away material he had just posted on the Internet, but complied anyway: "I was thinking that I was cooperating with deParrie's idea. Even though I thought it was a little bit dufus, but you know, I am with the program." (Tr. 2312)

453. Horsley claims to have forgotten any information about where he sent the files. "I purposely basically filed it away back there somewhere, you know, because I – the whole idea was that this is something that probably is best not to be remembered." (Tr. 2373) DeParrie denied that he asked Horsley to discard the files, but I find that testimony – as well as the testimony of the other defendants about the location of the Nuremberg Files – to be not credible.

V. *Adequacy of Remedy*

454. As a result of the defendants' issuance of these threats, plaintiffs have undertaken a variety of security measures in order to ensure their safety.

455. Based upon the evidence admitted at trial, the Court finds that plaintiffs remain threatened by the defendants' threats, and thus have no adequate remedy at law.

CONCLUSIONS OF LAW

456. From my independent review of the evidence produced at trial, from which I have made the above findings of fact, I conclude that plaintiffs have proven with clear and convincing evidence that each defendant, acting independently and as a co-conspirator, prepared, published and disseminated the Deadly Dozen poster, the Poster of Dr. Robert Crist and the Nuremberg Files.

457. I find that each defendant acted with specific intent and malice in a blatant and illegal communication of true threats to kill, assault or do bodily harm to each of the plaintiffs and with the specific intent to interfere with or intimidate the plaintiffs from engaging in legal medical practices and procedures. The term "threaten" as used hereafter incorporates this definition.

458. I totally reject the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from providing abortion services.

459. The Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, provides that in an action brought by a "person aggrieved" by threats of force, "the court may award appropriate relief, including temporary, preliminary, permanent injunctive relief and compensatory and punitive damages, as well as costs of suit and reasonable fees for attorneys . . . ." 18 U.S.C. § 248(c)(1)(B). In its verdict, the jury found each defendant liable under FACE and awarded each plaintiff compensatory and punitive damages against each defendant.

460. FACE provides this Court with express statutory authority for injunctive relief, and the substantial evidence of continuing harm to plaintiffs from defendants' unlawful threats provides clear factual and equitable bases for issuance of an injunction. In light of that authority, the general equitable authority of the Court, and the Court's findings concerning the grave threat to each plaintiff's security and the likelihood of continuing harm from each defendant, on February 25, 1999, I issued a permanent

injunction enjoining defendants from continuing their unlawful threats that place plaintiffs' lives in peril, and binding the defendants' agents, and those persons in active concert or participation with them. I now enter this amended order and permanent injunction, nunc pro tunc February 25, 1999. *See* Fed. R. Civ. P. 65(d).

461. Plaintiffs are entitled to permanent injunctive relief because they lack an adequate remedy at law. *See Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1104 (9th Cir. 1994). Each day, plaintiffs' lives and security are endangered because of defendants' unlawful threats against them. Monetary relief alone cannot address that harm. This Court has, therefore, the obligation to fashion equitable relief to protect the plaintiffs rights.

462. In deciding whether to grant permanent injunctive relief, the Court considers the balance of hardships or equities–weighing on one hand the harm to plaintiffs if the Court declines to prohibit the defendants' threats, and on the other hand the harm to defendants from an injunction ordering them to cease these activities. *See, e.g., Continental Airlines*, 24 F.3d at 1105; *Laerdal*, 73 F.3d 852 at 857. I find that the balance of hardships weighs overwhelmingly in plaintiffs' favor. In the absence of an injunction, plaintiffs will continue to live as they did before the trial: clad in bulletproof vests and disguises, borrowing cars and varying routes to avoid detection, and constantly in fear of the bodily harm with which they have been threatened.

463. By contrast, the prohibition of unlawful activities imposes no burden on defendants. Defendants may protest abortion using legitimate, lawful means.

464. The scope and terms of an injunction are determined by the extent of the underlying violation. *See Califano v. Yamasaki*, 442 U.S. 682, 702, 61 L. Ed. 2d 176, 99 S. Ct. 2545 (1979). This Court possesses great discretion in crafting an injunction and may frame it to "bar future violations likely to occur." *Transgo, Inc. v. AJAC Transmission Parts Corp.*, 768 F.2d 1001, 1021-22 (9th Cir. 1985) (citation omitted).

465. The law requires a higher level of scrutiny and proof for an injunction involving speech than for an award of damages for violation of a statute. *See Madsen v. Women's Health Center*, 512 U.S. 753, 129 L. Ed. 2d 593, 114 S. Ct. 2516 (1994). I find the actions of the defendants in preparing, publishing and disseminating these true threats objectively and subjectively [n1] were not protected speech under the First Amendment. Therefore, the Court issues the following permanent injunction against each defendant, their agents and those in active concert or participation with them, and specifically against Paul DeParrie, an employee and agent of defendant Advocates for Life Ministries, who conspired with Neal Horsley of Carrollton, Georgia, to provide the specific information for the Nuremberg Files and who thereafter obstructed justice by destroying or assisting in concealing the materials he provided to Horsley to convert into true threats on his web site.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

PERMANENT INJUNCTION

1. Under the equitable powers of this Court and the Court's authority granted under the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248, defendants AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, MICHAEL DODDS, TIMOTHY PAUL DRESTE, JOSEPH L. FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, DONALD TRESHMAN and CHARLES WYSONG (collectively "defendants"), and their agents and all persons in active concert or participation with any of them who receive actual notice of this Order and Permanent Injunction or the "Notice" attached as Exhibit A to this Order, are hereby immediately and permanently ENJOINED and RESTRAINED from committing any of the following acts or aiding, abetting, directing or facilitating others to commit or conspiring with any others to commit the following acts:

(a) Threatening, with the specific intent to do so, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, in violation of the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248;

(b) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the "Deadly Dozen" Poster, which is Trial Exhibit 1, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys;

(c) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the Poster of Dr. Robert Crist, which is Trial Exhibit 5, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients or attorneys;

(d) Providing additional material concerning Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business

as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, with a specific intent to threaten, to the Nuremberg Files or any mirror web site [n2] that may be created. In addition, defendants are enjoined from publishing, republishing, reproducing and/or distributing in print or electronic form the personally identifying information about plaintiffs contained in Trial Exhibits 7 and 9 (the Nuremberg Files) with a specific intent to threaten.

2. Defendants and their agents and all individuals in active concert or participation with any of them who receive actual notice of this Order and Permanent Injunction or the attached "Notice" shall promptly submit to the custody of the Court all materials in their possession, custody or control that are not in compliance with the provisions of this Permanent Injunction, except that counsel for the defendants may retain one copy of any such materials that were included in the Record of this Court.

3. Willful violation of this Order and Permanent Injunction or any other of this Court's orders may subject any person who commits such an act to criminal and/or civil prosecution for contempt of this Court. Any violation of this Order and Permanent Injunction will result in immediate issuance of an order to show cause for service on the violator, who after appropriate hearings and findings, will be dealt with within the sanctions provided by law.

4. Defendants, and their agents and all persons in active concert or participation with any of them, are hereby ENJOINED and RESTRAINED from disposing of, secreting, pledging, encumbering, conveying, transferring, damaging, mortgaging, or otherwise disposing or removing from its customary location or in any other way making unavailable to the processes of the court, any of their real property or personal property, including, but not limited to, cash, bank accounts, retirement plans, bonds, and other securities, liquid assets and personal property regardless of whether the

property is held jointly with another person or individually by the defendant.

5. This Court shall retain jurisdiction of this action for all purposes, including without limitation, all proceedings involving the interpretation, enforcement or amendment of this Order and Permanent Injunction.

DATED this 16th day of March, 1999, nunc pro tunc February 25, 1999.

ROBERT E. JONES

U.S. District Judge

Footnotes

n1 For purposes of this Order and Preliminary Injunction, I consider a person to make a "true threat" when the person makes a statement that, in context, a reasonable listener would interpret as communicating a serious expression of an intent to inflict or cause serious harm on or to the listener (objective); and the speaker intended that the statement be taken as a threat that would serve to place the listener in fear for his or her personal safety, regardless of whether the speaker actually intended to carry out the threat (subjective).

n2 A "mirror web site" within the meaning of this Order means a web site created by an independent party who takes the content from a web site and produces it on his or her own computer ("the web server") and locates it at a different Internet address.

Civil No. 95-1671-JO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; ET AL.,
Plaintiffs,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ET AL.,
Defendants.

October 14, 1998, Decided

October 14, 1998, Filed

COUNSEL:
For Plaintiffs: Carol J. Bernick, DAVIS WRIGHT TREMAINE, Portland, OR.

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JUDGES:
ROBERT E. JONES, U.S. District Judge.

OPINIONBY:
ROBERT E. JONES

OPINION:

OPINION AND ORDER

JONES, Judge:

Plaintiffs Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, and five individual physicians [n1] who provide abortions as part of their medical practices (together, "plaintiffs") brought this action against the American Coalition of Life Activists, Advocates for Life Ministries, and fourteen individual anti-abortion activists [n2] (together, "defendants"), seeking damages and injunctive relief for defendants' alleged violation of the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and the Oregon Racketeer

Influenced and Corrupt Organizations Act ("ORICO"), O.R.S. 166.720. [n3]

In September 1996, I made numerous rulings in this action on defendants' Rule 12(b) motions to dismiss. In essence, with the exception of the RICO and ORICO claims against defendant Bray, I permitted plaintiffs to proceed on all their claims, subject to my renewed scrutiny on appropriate motion for summary judgment. *See Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 945 F. Supp. 1355, 1378-79 (D.Or. 1996) ("*Planned Parenthood I*"). Since then, the parties have been engaged in and have completed extensive discovery.

The case is now before me on the defendants' motions for summary judgment (# # 203, 206, 211). In addition to the parties' excellent and thorough submissions and arguments, the ACLU Foundation of Oregon, Inc., as *amicus curiae*, filed an informative and helpful brief and participated at oral argument. I have considered the record and the arguments of counsel, and conclude that defendants' motions must be denied, with the exceptions noted below. I also agree with plaintiffs that, based upon the factual record now before the court, defendant Bray should be reinstated as a defendant to plaintiffs' federal and state RICO claims. [n4]

STANDARD

Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. *United Steelworkers of America v. Phelps Dodge*, 865 F.2d 1539, 1542 (9th Cir. 1989).

The substantive law governing a claim determines whether a fact is material. *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *see also T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987). Reasonable doubts as to the existence of a material factual issue are resolved against the moving party. *T.W. Elec. Service*, 809 F.2d at 631. Inferences drawn from facts are viewed in the light most favorable to the non-moving party. *Id.* at 630-31.

FACTUAL BACKGROUND

Plaintiffs brought this action for injunctive relief and damages to redress what they characterize as the "campaign of terror and intimidation" the defendants allegedly have waged against them through their organization, the American Coalition of Life Activists ("ACLA"). Specifically, plaintiffs claim that defendants' statements in certain posters and other documents, when viewed in the context of violence against abortion providers, constitute "true threats" for which they may be held liable. Defendants, in turn, maintain that the challenged statements constitute protected speech under the First Amendment for which they may not be held liable.

A. THE PARTIES

1. *Plaintiffs.*

The individual plaintiffs are physicians who provide abortions as part of their medical practices. The two clinics, Planned Parenthood of the Columbia/Willamette ("Planned Parenthood") and Portland Feminist Women's Health Center ("Portland Feminist") offer abortion services as well as other reproductive health care services. Planned Parenthood, a not-for-profit corporation organized under the laws of the state of Oregon, operates six clinics in Oregon. Portland Feminist, also a not-for-profit Oregon corporation, operates clinics in Portland and in Eugene, Oregon, under the name All Women's Health Services.

With the exception of plaintiff Sweigert and the two clinic plaintiffs, each of the individual plaintiffs has been the specific target of one or more of the statements alleged to constitute "true threats."

2. *Defendants.*

The ACLA, one of the two defendant organizations, is an unincorporated organization based in Portland, with members and activities throughout the United States. The record shows that the ACLA formed in 1994, following a doctrinal split in the antiabortion (or pro-life) movement over the issue of violence. *See, e.g.*, Plaintiffs' Concise Statement, Exhibit 53, p. 1.

Defendant Advocates for Life Ministries ("ALM") also is an unincorporated association that operates principally in Portland. ALM publishes *Life Advocate*, a magazine distributed nationally and internationally. The record shows that *Life Advocate* has published articles that endorse interference with and obstruction of abortion services through, among other things, use of force. *See, e.g.*, Plaintiffs' Concise Statement, Exhibit 61.

With the exception of defendant Bray, the individual defendants are present and former directors of the ACLA and have been actively involved in its activities, among other things. In addition to his role as a director of the ACLA, defendant Burnett is one of the founders of the ACLA, the executive director of ALM, and the publisher of *Life Advocate* magazine. Burnett also published Bray's treatise, *A Time to Kill*, and has marketed and distributed the treatise nationwide. Plaintiffs describe the treatise as an "attempt[] to justify revolution and vigilante violence" against abortion providers. Amended Complaint, ¶ 19.

Defendant Bray, who previously spent 46 months in federal prison for conspiring to bomb 10 clinics, authored *A Time to Kill*. Although I previously dismissed the RICO and ORICO claims against Bray, [n5] based upon the evidence of record, I am now satisfied that there is at least a genuine issue of material fact as to whether Bray participated sufficiently in the "operation and management" of the ACLA as to be potentially liable on plaintiffs' racketeering claims and that those claims should be reinstated against him. Moreover, based on Bray's refusal to comply with discovery orders, plaintiffs moved for an order of contempt against him, which I granted in part during oral argument on September

29, 1998. At that time, I also ruled that if defendant Bray did not submit to a further deposition by October 13, 1998, I would hold him in contempt. I now so hold, and further order him in default and his defenses stricken. In the event, however, that the remaining defendants prevail on the issue of whether their statements constitute true threats (see discussion below), then the order of default will be set aside.

B. *THE THREATS*

Plaintiffs have identified certain specific documents they contend contain actionable "true threats" when viewed in context. These specific documents are: (1) the "Deadly Dozen" poster and its various republications; (2) the poster of plaintiff Crist; (3) the bumper sticker "Execute Murderers/Abortionists" and its various republications; and (4) the "Nuremberg Files," which also include a file specific to plaintiff Hern that bears the heading "Third Trimester Butchers." These documents are attached to Plaintiffs' Concise Statement as Exhibits 45, 48, 49, 67 (Deadly Dozen); Exhibit 55 (Crist poster); Exhibits 23-31 (bumper sticker); and Exhibits 70-73 (Nuremberg Files [n6]).

Plaintiffs also identify as threats certain other ACLA posters distributed at the ACLA's St. Louis event in August 1995. These additional posters, attached as Exhibits 56-60 to Plaintiffs' Concise Statement, are discussed below. None of these additional posters mentions any of the plaintiffs in this case.

Significantly for purposes of the present motions, no statement contained in the text of the Deadly Dozen poster, the Crist poster, or the Nuremberg Files is expressly threatening, in the sense that there are no "quotable quotes" calling for violence against the targeted providers. Instead, the documents contain the following statements:

1. *Deadly Dozen Poster.*

Defendant Crane presented the Deadly Dozen poster at a press conference held during an ACLA meeting on January 21, 1995. Several of the individual defendants, including defendant Bray, were present.

The poster contains a heading in large, bold print that states: "GUILTY of Crimes Against Humanity." The document then makes a statement about prosecution of abortion as a "war crime" during the Nuremberg trials in 1945-46. The poster next sets out – under the heading "THE DEADLY DOZEN" – the names, addresses, and telephone numbers of 12 people, including both Newhall plaintiffs and plaintiff Hern. The poster then offers a "$ 5,000 reward" for "information leading to arrest, conviction and revocation of license to practice medicine," states in large letters "ABORTIONIST," and gives the name and address of the ACLA. Thus, the statement that stands out because it is emphasized either by the size and/or boldness of print, reads: "GUILTY OF CRIMES AGAINST HUMANITY * * * THE DEADLY DOZEN * * * $ 5,000 REWARD * * * ABORTIONIST." *See* Exhibit 45 to Plaintiffs' Concise Statement.

The evidence shows that the FBI informed the Newhall plaintiffs and plaintiff Hern about the poster on the evening of January 21, 1995, and almost immediately offered them around-the-clock federal marshal protection. The FBI also advised these plaintiffs to obtain and wear bulletproof vests and to take other precautions, which they did. Plaintiff Sweigert, who sometimes works at the same Portland clinic where the Newhalls work, also purchased a bulletproof vest within days after the ACLA released the Deadly Dozen poster. In addition, because of their working relationships with the Newhalls and Sweigert, Portland Feminist and Planned Parenthood undertook additional security measures following release of the Deadly Dozen poster.

2. *The Crist Poster.*

The ACLA released the Crist poster and five other posters during a conference held on August 2-5, 1995. Three of the posters specifically identified doctors; three others identified specific reproductive health care clinics. Of these, one (Reproductive Health Services) is a Planned Parenthood affiliate where Crist worked. The evidence shows that several of the defendants were involved in planning the posters.

The poster targeting plaintiff Crist bears the initial heading "GUILTY" in very large print, followed by "OF

CRIMES AGAINST HUMANITY" in somewhat smaller print. The poster then sets out the same statement about the Nuremberg trials that appears on the Deadly Dozen poster, followed by the statement "Abortionist Robert Crist." Below that statement is a photograph of Crist, and a listing of his home and work addresses. Directly below the photograph is language, in tiny print, describing Crist as a "notorious Kansas City abortionist [who] travels to St. Louis weekly to kill babies at Reproductive Health Services * * *. He also sometimes kills women." The poster next recites information about women allegedly injured by Crist, followed by a request (again, in tiny print) to

> Please write, leaflet or picket his neighborhood to expose his blood guilt. Ask Crist to turn from killing and injuring women and children, to helping and healing those in need.

In large print directly below the quoted language are the words "$ 500 REWARD" followed by (in tiny print) "to any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines." Finally, like the Deadly Dozen poster, the word "ABORTIONIST" appears in very large print, followed by the ACLA's name and address. Thus, the emphasized portions of the poster read "GUILTY OF CRIMES AGAINST HUMANITY * * * Abortionist Robert Crist * * * $ 500 REWARD * * * ABORTIONIST." *See* Exhibit 55 to Plaintiffs' Concise Statement.

Following release of the poster, Crist received additional protection from both state and federal law enforcement authorities. [n7]

3. *The Bumper Sticker.*

According to plaintiffs' evidence, Bray created the bumper sticker, which has been distributed at anti-abortion events and through the mail since about 1992. The bumper sticker, which appears in a variety of exhibits, states, in very large black letters, "EXECUTE." To the right of "execute," in red letters, is the word "Murderers" and the word

"Abortionists" directly below it. The advertisements for the bumper sticker state that the background color is yellow. *See, e.g.*, Exhibits 23 and 24 to Plaintiffs' Concise Statement.

4. *The Nuremberg Files.*

During an ACLA event in January 1996, Paul deParrie, who is not a defendant, displayed a box that defendant Crane labeled the "Nuremberg Files." In the box were files that contained personal identifying information on doctors. [n8] At the same event, defendants held a "White Rose Banquet," at which they honored individuals who were incarcerated for committing anti-abortion violence.

The Nuremberg Files appeared on the Internet in January 1997. At the top of the first page on the Internet was the statement "VISUALIZE Abortionists on Trial," followed by:

THE NUREMBERG FILES

> The American Coalition of Life Activists (ACLA) is cooperating in collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity. *Click the Hot Link at the bottom of this page to vote to make this site a "Starting Point Hot Site."* Your vote can bring tens of thousands of people face to face with the fact that everybody faces a payday someday, a day when what is sown is reaped.
>
> Why This Must Be Done
>
> One of the great tragedies of the Nuremberg trials after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes.
>
> We do not want the same thing to happen when the day comes to charge abortionists with their crimes. We anticipate the day when these people

> will be charged in PERFECTLY LEGAL COURTS once the tide of the nation's opinion turns against child-killing (as it surely will).

Plaintiffs' Concise Statement, Exhibit 70, p. 1. The names of approximately 200 people labeled "ABORTIONISTS: the shooters," as well as more than 200 others [n9] are listed in the Nuremberg Files.

As described above, the Nuremberg Files contain personal identifying information (including a photograph) of plaintiff Hern under the heading "THIRD TRIMESTER BUTCHERS." Plaintiffs' Concise Statement, Exhibit 71, p. 1. The document states that the reader "might want to share your point of view with this 'doctor,'" and further states:

> If you can find any other information (web pages, etc.) we'd appreciate you sending it to us.
>
> Also, Please find out this information on the butchers in your state who do partial birth and third trimester abortions. There certainly must be a special place in hell for such unrepentant slaughterers of God's children.

Id. three areas, the page bears drawings of what appear to be lines of dripping blood.

Also as mentioned above, there is evidence that in 1995, defendants Burnett and Ramey had displayed a Nuremberg File containing a poster and color photographs of plaintiff James Newhall and of his home. There is no evidence that personal information concerning the other plaintiff doctors appeared in the files or on the Internet, although several plaintiffs' names and the names of certain employees of the plaintiff clinics are listed. *See* Plaintiffs' Concise Statement, Exhibit 70, pp. 4-8; *see also* footnote 9.

C. *THE CONTEXT OF VIOLENCE*

Plaintiffs' submissions describe, in great detail, a period of escalating violence against abortion providers reaching back at least to the murder of Dr. David Gunn in March 1993. Defendants do not seriously challenge the factual accuracy of plaintiffs' description of these events, but focus instead on the relevancy of the contextual events to the legal issues at hand. Accordingly, I will not summarize the facts giving rise to the "context of violence" here, but note only that there is substantial evidence of record from which a rational trier of fact could conclude that the defendants in this case were aware of and promoted the atmosphere of violence surrounding the antiabortion movement.

DISCUSSION

A. *EXISTENCE OF "TRUE THREAT"*

The primary issue raised by defendants' motions is whether the statements plaintiffs attribute to them are protected speech subject to First Amendment protection. If the statements are protected speech then, as a matter of law, each of plaintiffs' claims fails because each depends upon proof that the defendants made threats that are not entitled to constitutional protection.

To sustain their claims under FACE, plaintiffs must prove that the defendants violated or conspired to violate FACE, which, as relevant to this case, proscribes "threats of force" that intentionally "intimidate" a person from providing reproductive health services. 18 U.S.C. § 248(a)(1). "Intimidate" is defined in FACE to mean "to place a person in reasonable apprehension of bodily harm to him- or herself or to another." 18 U.S.C. § 248(e)(3).

With respect to their RICO and ORICO claims, plaintiffs assert, as the requisite predicate acts, that defendants [n10] engaged in extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, and the Oregon coercion statute, O.R.S. 163.275, both of which (for purposes of plaintiffs' claims in this case) require proof of threats of force.

Thus, the viability of each of plaintiffs' claims depends on whether the defendants' statements constitute protected speech or unprotected "true threats." This is because unlike political hyperbole or other protected speech, "true threats" are not protected under the First Amendment. *Watts v. United States*, 394 U.S. 705, 708, 22 L. Ed. 2d 664, 89 S. Ct. 1399 (1969). Although the Ninth Circuit has articulated an objective, speaker-based test for use in determining whether an alleged threat is a "true threat" for purposes of First Amendment analysis, *see, e.g., Lovell v. Poway Unified School District*, 90 F.3d 367, 372 (9th Cir. 1996), the applicability of that objective test in the circumstances of this case has been challenged by the defendants and questioned by amicus curiae. I discuss the arguments in turn.

1. *Defendants' Arguments.*

Defendants [n11] premise their arguments on the proposition that the statements at issue in this case contain no apparent threats and are facially non-threatening. Based on that premise, defendants assert that the court should not resort to "contextual analysis" to determine if a threat exists, i.e., should not consider the factual circumstances, including the surrounding events and the reaction of the listeners, but should instead dismiss plaintiffs' claims on a facial challenge. In support of this argument, defendants rely on a Second Circuit decision, *United States v. Kelner*, 534 F.2d 1020, 1027 (2nd Cir. 1976). In *Kelner*, the court stated that

> So long as the threat *on its face and in the circumstances* in which it is made is so *unequivocal, unconditional, immediate, and specific* as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied. (Emphasis added.)

Defendants interpret *Kelner* to require that a threat be "unequivocal, unconditional, immediate, and specific" both on its face and in context before it can constitute a true threat. Moreover, defendants contend that the *Kelner* test was adopted by the Ninth Circuit in *Lovell v. Poway Unified*

School District, based upon the *Lovell* court's citation to *Kelner* as in "accord" with Ninth Circuit precedent. *See Lovell*, 90 F.3d at 372.

Defendants also rely heavily on an Oregon Court of Appeals case, *Hanzo v. DeParrie*, 152 Ore. App. 525, 953 P.2d 1130 (1998), which involved a challenge to a civil stalking order issued under O.R.S. 30.866, for the proposition that "contextual overlay" may not be considered in assessing facially non-threatening speech. *See Hanzo*, 152 Ore. App. 525, 953 P.2d 1130 at 1140. Defendants also rely on *Hanzo* as support for their position that expression may only constitute a threat if it is "so unambiguous, unequivocal, and specific to the addressee" that it convincingly expresses the intention that the threat will be carried out. Memorandum of Law on Behalf of Defendants Miller and Threshman, p. 6.

2. *Plaintiffs' Arguments.*

Plaintiffs respond that the Ninth Circuit has consistently applied an objective, speaker-based test in determining whether a threat is a "true threat." *See, e.g., Lovell*, in which the Ninth Circuit explained:

> We have set forth an objective test for determining whether a threat is a "true threat" and, thus, falls outside the protection of the First Amendment: "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990). Furthermore, "alleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." *Id.* (citing *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989), * * * and *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir. 1987) * * *.[n12]

90 F.3d at 372.

Plaintiffs contend that under Ninth Circuit precedent, statements must be evaluated within their full context to determine whether they are true threats, and there is no requirement that the threat be apparent on its face before context may be considered. *See U.S. v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990) ("'The fact that a threat is subtle does not make it less of a threat'" (quoting *U.S. v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989)); *see also U.S. v. Fulmer*, 108 F.3d 1486, 1492 (1st Cir. 1997) ("The use of ambiguous language does not preclude a statement from being a threat"). [n13]

Plaintiffs also argue that the Second Circuit has not adhered to the strict approach defendants would have the court read into *Kelner*. In *U.S. v. Malik*, 16 F.3d 45 (2nd Cir. 1994), the Second Circuit clarified that ambiguous threats, *standing alone*, cannot establish a predicate for criminal liability. The court recognized, however, that if substantial additional contextual evidence is presented – including evidence of the recipients' states of mind and their reactions -- "the existence vel non of a 'true threat' is a question generally best left to a jury." *Malik*, 16 F.3d at 50-51. The court explained:

> "Written words or phases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published." Thus, rigid adherence to the literal meaning of a communication without regard to its reasonable connotations derived from its ambience would render the statute powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat. Surely, an equivocal letter with equal chances of being interpreted innocuously or harmfully should not, in and of itself, convince a jury * * * that it is a threat. *But once sufficient extrinsic evidence, capable of showing beyond a reasonable doubt that an ordinary and*

> *reasonable recipient familiar with the context of the letter would interpret it as a threat, has been adduced the trial court should submit the case to the jury.*

Malik, 16 F.3d at 50 (citation omitted; emphasis added).

Finally, plaintiffs maintain that whether a statement is a true threat is a question of fact for the trier of fact. I resolved this issue in favor of plaintiffs in *Planned Parenthood I*, and adhere to my earlier ruling on this point. *See Planned Parenthood I*, 945 F. Supp. at 1372 n.14 ("contrary to Defendants' assertions, the jury determines whether a threat constitutes a 'true threat'"); *see also Melugin v. Hames*, 38 F.3d 1478, 1485 (9th Cir. 1994) (whether plaintiff has shown a "true threat" is a question of fact for the jury, not a question of law for the court).

3. *Position of the Amicus Curiae.*

The ACLU acknowledges that the Ninth Circuit has adopted an objective, speaker-based test to determine whether an alleged threat is a true threat for purposes of First Amendment analysis. Nevertheless, the ACLU urges the court to adopt a different test in this case, one with both an objective, listener-based component and a subjective, speaker-based component. The subjective speaker-based component is necessary, according to the ACLU, to insure that there is proof that the speaker actually intended to threaten rather than merely to communicate an idea using protected speech. Specifically, the ACLU proposes that plaintiffs be required to show the following:

> 1. Considering the alleged threat in light of its relevant factual context, would a reasonable listener (or recipient of the communication) interpret the statement as communicating a serious expression of an intent to inflict or cause serious harm to the listener, i.e., would a reasonable person perceive the statement as a threat?

> 2. Did the speaker intend that the communication be taken as a threat to inflict or cause serious harm to the listener, thereby intending to place the listener in fear for his or her safety, regardless of whether the speaker actually intended to carry out the threat?

Memorandum of ACLU Foundation of Oregon, p. 27.

At oral argument, the ACLU justified this substantial departure from Ninth Circuit precedent by arguing that the present case is sufficiently distinguishable as to qualify as one of first impression in this circuit. In saying this, the ACLU appears to agree with defendants the statements at issue are facially innocuous, i.e., contain no express threats or even ambiguously threatening language.

4. *Analysis.*

In view of the parties' arguments, the threshold issue that must be resolved is whether the Ninth Circuit has adopted by reference the narrow *Kelner* requirement that a threat be "so unequivocal, unconditional, immediate and specific * * * as to convey a gravity of purpose and imminent prospect of execution." *Kelner*, 534 F.2d at 1027. Although defendants read much into the *Lovell* court's use of the signal *accord*, as the *amicus curiae* points out, the Ninth Circuit's use of the signal *accord* is confusing at best, *see* Memorandum of ACLU Foundation of Oregon, p. 30 n.24, and I am not persuaded that by that simple reference, the Ninth Circuit intended thereafter to graft the *Kelner* test – however it is interpreted -- onto existing Ninth Circuit law. Instead, I construe the citation to *Kelner* as a recognition that the Second Circuit, like the Ninth Circuit, holds that whether a threat is a true threat must be determined in light of the context (or circumstances) in which it is made.

That the Ninth Circuit does not consider *Kelner* controlling is apparent even from *Lovell*, the case on which defendants rely. In *Lovell*, the Ninth Circuit reversed a trial court judgment in favor of the plaintiff, a high school student who was suspended for threatening her school guidance counselor. The parties gave differing versions of the remark

that was the basis of the suit. The student claimed that she said "I'm so angry, I could just shoot someone," whereas the guidance counselor claims the student said "If you don't give me this schedule change, I'm going to shoot you!" *Lovell*, 90 F.3d at 369. The trial court evidently accepted the student's version, at least in part. *See Lovell*, 90 F.3d at 369 n.1. After making the statement, the student apologized to the guidance counselor for her inappropriate behavior, and left the office.

The trial court found that no matter which statement the student made, it was not a "true threat." In reversing, the Ninth Circuit noted that the trial court "lost sight of the fact that the *ultimate inquiry is whether a reasonable person in [the student's] position would foresee that [the guidance counselor] would interpret her statement as a serious expression of intent to harm or assault.* 90 F.3d at 372 (emphasis added). The court held that a reasonable person in the circumstances would have foreseen that the guidance counselor would interpret the statement "If you don't give me this schedule change, I'm going to shoot you" – a conditional threat – as a serious expression of intent to harm. *Lovell*, 90 F.3d at 372; *see also U.S. v. Gilbert*, 884 F.2d at 457 (fact that threat is subtle does not make it less of a threat; trial court was correct in reviewing all mailings as a whole, rather than parsing them).

I conclude that, to the extent the Second Circuit continues to adhere to *Kelner* (see the discussion at pages 20-21, *supra*), it is not Ninth Circuit law.

I turn now to the question of whether the Ninth Circuit objective speaker-based test should apply in this case, or whether I should adopt the ACLU's proposed two-part test. I have carefully evaluated the Ninth Circuit cases from which the present objective test evolved, and conclude that the existing test adequately protects the defendants' First Amendment rights in this case.

It appears that the Ninth Circuit first articulated the objective speaker-based test in *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969). In *Roy*, the court was called upon to construe the willfulness requirement of 18 U.S.C. § 871, which prohibited "willfully" threatening the President of the United

States. The court held that "willful" was coextensive with "intentional":

> This Court therefore construes the willfulness requirement of the statute to require only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of a mistake, duress, or coercion. The statute does not require that the defendant actually intend to carry out the threat.

Roy, 416 F.2d at 877-78 (footnotes omitted). Thus, in *Roy*, the Ninth Circuit concluded that for purposes of section 871, "willful meant only intentional." *Gilbert II*, 884 F.2d at 458; *see Roy*, 416 F.2d at 877. Moreover, *Roy* established that the appropriate test for insuring proof of the requisite intent was an objective, speaker-based test. The test set forth in *Roy*, however, unlike the current Ninth Circuit formulation in, for example, *Lovell*, also appears to have included an element of proof that the statement was not "the result of mistake, duress, or coercion" or even jest. *Roy*, 416 F.2d at 877-78.

In *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984), the court again emphasized that the intent requirement of section 871 was to be determined by the objective test set forth in *Roy*, 746 F.2d 458 at 462. The *Merrill* court also emphasized that "whether any given form of written or oral expression constitutes a true threat for the statute's purposes is a question for the trier of fact under all of the circumstances." *Merrill*, 746 F.2d at 462.

A few years later, in *U.S. v. Gilbert*, 813 F.2d 1523 (9th Cir. 1987) ("*Gilbert I*"), the court addressed the defendant's First Amendment challenge to a provision of the Fair Housing Act, 42 U.S.C. § 3631, a statute remarkably similar to FACE. Section 3631 prohibits, among other things, use of threats of

force to "willfully" intimidate or interfere with any person on the basis of race, color, religion, sex, or national origin in the occupation of a dwelling, including the placement of adopted children in housing. *See U.S. v. Gilbert*, 813 F.2d 1523, 1526-27 (9th Cir. 1987) ("*Gilbert I*"); *see also U.S. v. Gilbert*, 884 F.2d 454, 456 (9th Cir. 1989) ("*Gilbert II*").

In rejecting defendant's First Amendment challenge to his indictment under the statute, the court noted that the element of intent – i.e., the "willfulness requirement" – was the "determinative factor separating protected expression from unprotected criminal behavior." *Gilbert* I, 813 F.2d at 1529. The court further noted, however, that

> Whether any given form of written expression can supply the requisite intent requirement is a question for the trier of fact. * * * Certain types of expression which by their nature inflict injury or tend to incite an immediate breach of the peace are arguably unprotected. * * * The government bears the ultimate burden of proving that Gilbert's actions were taken with the requisite intent to place them into that category. * * * Thus it is a jury question whether actions and communications are clearly outside the ambit of first amendment protection.

Gilbert I, 813 F.2d at 1529-30 (citations omitted).

Two years later, in *Gilbert II*, the Ninth Circuit decided Gilbert's direct appeal from his conviction under section 3631. Confirming that section 3631 contains an intent requirement, the Ninth Circuit also extended the rationale of *Roy* (decided under 18 U.S.C. § 871) to section 3631, holding, in essence, that whether a threat is a "true threat" must be determined in light of the entire factual context, including consideration of surrounding events and the reaction of the listeners. *Gilbert II*, 884 F.2d at 457, 458. The court stated:

> While the mailings may not have said "we're going to hurt you, Susan Smith," they certainly said "we don't like what you're doing, and we hurt people

> who do things we don't like." The fact that a threat is subtle does not make it less of a threat. The district court was correct in reviewing all of the mailings as a whole, rather than parsing them as Gilbert suggests. Viewed as a whole, and using the contextual analysis we have used for other statutes, a rational trier of fact could find a threat.

Gilbert II, 884 F.2d at 457.

Significantly, the court affirmed the trial court's rejection of defendant's proposed jury instruction that stated that a threat is willfully made "'if the maker voluntarily and intelligently utters the words in an apparent determination to carry out the threat,'" finding no material difference between an instruction requiring a true threat and one requiring "'an apparent determination to carry out the threat.'" 884 F.2d at 457. The court explained:

> [In *Roy*,] [w]e concluded that willful meant only intentional. * * * This rationale – that the threat *qua* threat is harmful and prohibited – would best serve the purpose of section 3631. * * *
>
> Under the analysis suggested by *Roy*, it is clear that the district court did not abuse its discretion. The given instruction advised jurors that the threat must be a "true threat" – as opposed, for example, to political hyperbole – and that it must have been intentionally made. Whether language is or is not a true threat is a proper question for a jury.

Gilbert II, 884 F.2d at 458 (citations omitted).

The Ninth Circuit has consistently adhered to the *Roy* objective test. In *U.S. v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990), for example, the defendant was convicted of threatening federal law enforcement officers in violation of 18 U.S.C. § 115. In analyzing the defendant's assertion that his statements were not threats, the court noted that "alleged

threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." 903 F.2d at 1265 (citing *Gilbert II*, 884 F.2d at 457). The court further explained that

> Whether a particular statement may properly be considered to be a threat is governed by an objective standard – whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. * * * A "true" threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment.

Orozco-Santillan, 903 F.2d at 1265-66. In a footnote, the court further clarified that "the only intent requirement is that the defendant intentionally or knowingly communicates his threat, not that he intended or was able to carry out his threat." 903 F.2d at 1265 n.3 (citing *Gilbert II*, 884 F.2d at 457; and *United States v. Davis*, 876 F.2d 71, 73 (9th Cir. 1988) (applying 18 U.S.C. § 876)).

Importantly, the statute at issue in *Gilbert I* and *II*, 42 U.S.C. § 3631, and FACE, 18 U.S.C. § 248(a), are nearly identical in all respects material to this case. Section 3631(c) punishes

> [w]hoever * * * by force or *threat of force willfully* injures, *intimidates*, or interferes with, or attempts to injure, intimidate, or interfere with * * * any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex or national origin, in [the occupation of a dwelling].

42 U.S.C. § 3631(c) (emphasis added).

Similarly, FACE punishes

> [w]hoever * * * by force or *threat of force* or by physical obstruction, *intentionally* injures, *intimidates* or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any person or any class of persons from, obtaining or providing reproductive health services * * *.

18 U.S.C. § 248(a)(1) (emphasis added).

Although section 3631 uses "willfully" and FACE uses "intentionally," under the Ninth Circuit precedent discussed above, the difference in language between the two statutes is not substantive. Thus, while the ACLU is correct that FACE contains an element of intent, that requirement is not peculiar to FACE and does not, in my view, require a departure from existing Ninth Circuit law. Both statutes punish threats and both, therefore, carry the potential to encroach on First Amendment rights. The rationale of *Roy*, which the Ninth Circuit has extended repeatedly to other "threat" statutes, applies equally here.

If there is a distinction between existing Ninth Circuit cases and this one, it is in the content of the statements constituting the alleged threats. On this, I tend to agree with the defendants and the ACLU that the statements at issue do not contain any expressly or apparently threatening language. Nevertheless, I do not agree with defendants that a threat must be apparent on its face before context may be considered. Instead, the Ninth Circuit consistently has emphasized that whether statements are "true threats" must be determined "in light of their entire factual context." *See, e.g., Lovell, supra*, 90 F.3d at 372. I also do not agree that the lack of expressly threatening language requires creation of a different test. In *Roy*, for example, the defendant argued that the word "get" in the statement "I am going to get him" could innocently mean only "become even with" or "gain an advantage over." The Ninth Circuit emphasized that the

import of the statement as innocent or threatening must be determined from the context in which it was made. *Roy*, 416 F.2d at 876 n.6. [n14]

The ACLU's concern, as well as that of the defendants, is that liability not attach unless the threats are intentionally made, and do not constitute jests or political hyperbole, even extreme political hyperbole. The cases discussed above amply show that the Ninth Circuit shares this concern, and yet repeatedly has confirmed that an objective speaker-based test that considers all the circumstances is sufficient to permit the trier of fact to distinguish between "true threats" and speech protected by the First Amendment. *See, e.g.*, *Gilbert II*, 884 F.2d at 457 n.5, and *Gilbert I*, 813 F.2d at 1529 ("the statute's requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech"). Accordingly, I decline to depart from established Ninth Circuit law and create a test unique to this case. [n15]

B. *THE ALLEGED THREATS*

Of the documents plaintiffs contend contain threats, I agree with the ACLU and the defendants that only three of them, the Deadly Dozen poster, the Crist poster, and the Nuremberg Files (including the Hern poster contained in the Nuremberg Files), are actionable. Plaintiffs' evidence fails to raise an issue of fact as to whether the defendants reasonably should have foreseen that the plaintiffs would interpret the bumper sticker "as a serious expression of an intention to inflict bodily harm" on any one of them. *Roy*, 416 F.2d at 877. While the bumper sticker suggests violent action and may represent the fringe of political hyperbole, the generality of language and the circumstances of its wide dissemination convince me that it is not susceptible of an interpretation that it constitutes a "true threat" of harm to anyone in particular. The defendants' involvement in the creation, sale, display, or approval of the bumper sticker, however, certainly are part of contextual facts relevant to this case.

The other posters identified by the plaintiffs as alleged threats (Exhibits 56-60), which the ACLA released in St. Louis

in August 1995, do not refer to any of these plaintiffs. Plaintiffs have not argued that they should be allowed to proceed on the specified posters, and I conclude that those posters are not actionable in this case.

In summary, plaintiffs' claims of threat, as opposed to the context in which the threats were made, are limited to the Deadly Dozen poster, the Crist poster, the Nuremberg Files (including the Hern poster), and any republications of those documents.

C. *STANDING OF PLAINTIFFS SWEIGERT, PLANNED PARENTHOOD, AND PORTLAND FEMINIST*

Defendants contend that plaintiffs Sweigert, Planned Parenthood, and Portland Feminist lack "standing" to pursue claims under either FACE or RICO, because the alleged threats did not specifically mention or target them. According to defendants, Sweigert, Planned Parenthood, and Portland Feminist "are nothing more than bystanders, pointing to the alleged misfortunes of third parties as their only basis for standing." Reply Memorandum of Defendants Miller and Treshman, p. 70.

FACE permits "any person aggrieved by reason of the conduct prohibited by subsection (a)" to commence a civil action for recovery of injunctive relief, compensatory damages, and punitive damages. 18 U.S.C. § § (c)(1)(A) and (B). Sweigert and the clinic plaintiffs have presented evidence that, because of their working relationships with the actual targets of the alleged threats, they also felt threatened and undertook security measures as a result. While defendants express skepticism toward plaintiffs' evidence, I am not persuaded that these plaintiffs lack standing *as a matter of law* to pursue their claims. As acknowledged by the plaintiffs in their reply brief, at trial *each* plaintiff will be required to prove that a reasonable person [n16] in that plaintiff's position would have felt threatened by the defendants' statements in the context in which the statements were made. Moreover, to prevail on their RICO and ORICO claims, each plaintiff must prove pecuniary loss. Nevertheless, Sweigert's and the clinics' evidence, although thin, is

sufficient to create a genuine issue of material fact on these issues for purposes of the present motions, and summary judgment must be denied.

D. *AVAILABILITY OF PUNITIVE DAMAGES*

As in their earlier motions, defendants again contend that Article I, section 8, of the Oregon Constitution prohibits any award of punitive damages in this case. Defendants assert: "The Oregon Constitution forbids punitive damages for any injury resulting even from an *abuse of protected expression*." Memorandum of Law on Behalf of Defendants Miller and Treshman, p. 48 (underscoring added). That argument itself, however, suggests the proper resolution of the issue at this juncture. If the trier of fact determines that defendants have made "true threats," then defendants' statements are not "protected expression" under either the Oregon Constitution or the First Amendment. *See* the discussion of this issue in *Planned Parenthood I*, 945 F. Supp. at 1387-88. If the trial results in a decision against some or all of the defendants on the issue of "true threat," then and only then will I determine whether to submit the issue of punitive damages.

E. *REMAINING ISSUES*

Defendants make a variety of other arguments in favor of summary judgment or partial summary judgment. These other arguments either depend on a finding that the statements at issue are not "true threats" as a matter of law, or involve issues of disputed fact (including the involvement of each defendant in making or conspiring to make the alleged threats). Accordingly, to the extent that this opinion has not already addressed these arguments, defendants' remaining arguments are rejected with respect to the present motions.

CONCLUSION

Defendants' motions for summary judgment (# # 203, 206, and 211) are DENIED with the following exceptions: Summary judgment is granted in favor of all defendants on

plaintiffs' claims arising out of the bumper sticker and the posters attached as Plaintiffs' Exhibits 56-60 to the Concise Statement of Material Fact. It is further

ORDERED that (1) defendant Bray is reinstated as a defendant to plaintiffs' RICO and ORICO claims, and (2) defendant Bray is in contempt and declared to be IN DEFAULT and his defenses stricken as a sanction for noncompliance with court orders, subject to relief from default, if appropriate, after a verdict is rendered on the issue of the existence of "true threats."

DATED this 14th day of October, 1998.

ROBERT E. JONES

U.S. District Judge

Footnotes

n1 The individual plaintiffs are Robert Crist, Warren Hern, Elizabeth Newhall, James Newhall, and Karen Sweigert.

n2 The individual defendants are Michael Bray, Andrew Burnett, David Crane, Timothy Dreste, Michael Dodds, Joseph Foreman, Charles McMillan, Stephen Mears, Monica Miller, Bruce Murch, Catherine Ramey, Dawn Stover, Donald Treshman, and Charles Wysong.

n3 Plaintiffs have withdrawn their state law claims for intentional infliction of emotional distress.

n4 As noted below, I have found defendant Bray in contempt and ordered his default based on his failure to comply with discovery orders.

n5 The court granted defendants' motion to dismiss Bray as a defendant in the RICO and ORICO claims on the ground that the complaint failed to allege sufficient participation on Bray's part in the ACLA enterprise. *See Planned Parenthood I*, 945 F. Supp. at 1385.

n6 Additional versions of the Nuremberg Files are attached as Exhibit C to the Affidavit of Maria Vullo and as Exhibit G to the Affidavit of Elizabeth Newhall.

n7 In August 1992, Crist was accosted by a group led by Treshman at the airport in Houston, Texas. From then until May 1993, Crist did not practice any form of medicine. Eight days after he returned to his medical practice, shots were fired into his children's playroom. No arrests were ever made in the shooting. Affidavit of Robert Crist, ¶ 11.

n8 There is evidence that one of the "Nuremberg Files" targeted plaintiff James Newhall. Affidavit of Elizabeth Newhall, Exhibit G. Defendants have not produced that file to plaintiffs. *See* Plaintiffs' Memorandum in Opposition, ¶ 32.

n9 The other names appear under the label "CLINIC WORKERS: their weapons bearers," "JUDGES: their shysters," "POLITICIANS: their mouthpieces," "LAW ENFORCEMENT: their bloodhounds," or "MISCELLANEOUS BLOOD FLUNKIES." Plaintiffs' Concise Statement, Exhibit 70, pp. 5-8.

n10 That is, all of the defendants except the ACLA, which plaintiffs allege to be the "enterprise."

n11 Because the defendants have incorporated each other's submissions, their arguments will not be addressed separately.

n12 The citation to *Kelner* on which defendants rely immediately follows the citation to *Mitchell* in the quoted statement from *Lovell*.

n13 The Fulmer court affirmed the trial court's jury instruction that "the fact that a threat is subtle or lacks explicitly threatening language does not make it less of a threat." 108 F.3d at 1494.

n14 Moreover, despite some similarities between the facts of this case and the conduct at issue in *Hanzo v. DeParrie*, 152 Ore. App. 525, 953 P.2d 1130 (1998), state law analysis, while certainly instructive, does not "trump" Ninth Circuit analysis of federal law. *See Lovell*, 90 F.3d at 371 (district court implicitly and inappropriately allowed California Education Code to trump federal law). Thus, *Hanzo*, decided under state law, is not controlling.

n15 I emphasize that plaintiffs will not be permitted to present "expert" evidence on the issue of whether the statements are "true threats."

n16 To prove intimidation, each plaintiff must prove that he or she was placed "in *reasonable* apprehension of bodily harm to him- or herself or to another." 18 U.S.C. § 248(e)(3) (emphasis added).

No. 99-35320, No. 99-35325, No. 99-35327,
No. 99-35331, No. 99-35333, No. 99-35405

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
Plaintiffs-Appellees,

and KAREN SWEIGERT, M.D.,
Plaintiff,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID A. CRANE; TIMOTHY PAUL DRESTE; MICHAEL B. DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; STEPHEN P. MEARS; BRUCE EVAN MURCH; CATHERINE RAMEY; DAWN MARIE STOVER; CHARLES WYSONG,
Defendants,

and MONICA MIGLIORINO MILLER; DONALD TRESHMAN,
Defendants-Appellants.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
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and MICHAEL DODDS; CHARLES ROY MCMILLAN; BRUCE EVAN MURCH,
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Defendants,

and TIMOTHY PAUL DRESTE; JOSEPH L. FOREMAN; CHARLES WYSONG,
Defendants-Appellants.

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Defendants-Appellants,

and TIMOTHY PAUL DRESTE; MICHAEL DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; STEPHEN P. MEARS; MONICA MIGLIORINO MILLER; BRUCE EVAN MURCH; DONALD TRESHMAN; CHARLES WYSONG,
Defendants.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
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AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID A. CRANE; TIMOTHY PAUL DRESTE; MICHAEL B. DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; BRUCE EVAN MURCH; CATHERINE RAMEY; DAWN MARIE STOVER; DONALD TRESHMAN; CHARLES WYSONG,
Defendants.

PAUL DEPARRIE,
Movant-Appellant.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.; KAREN SWEIGERT, M.D., individually and on behalf of all persons similarly situated,
Plaintiffs-Appellees,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID CRANE; TIMOTHY PAUL DRESTE; MICHAEL DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; MONICA MIGLIORINO MILLER; BRUCE EVAN MURCH; CATHERINE RAMEY; DAWN MARIE STOVER; DONALD TRESHMAN; CHARLES WYSONG,
Defendants-Appellants.

Filed July 10, 2002

Before: Mary M. Schroeder, Chief Judge, and Stephen Reinhardt, Alex Kozinski, Diarmuid F. O'Scannlain, Pamela Ann Rymer, Andrew J. Kleinfeld, Michael Daly Hawkins, Barry G. Silverman, Kim McLane Wardlaw, Marsha S. Berzon, and Johnnie B. Rawlinson, Circuit Judges.

ORDER

Judge Kozinski's dissent from the opinion filed May 16, 2002, is amended as follows:

1. Kozinski Dissent at 7147. After:

But neither Dr. Gunn nor Dr. Patterson was killed by anyone connected with the posters bearing their names. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1134-35 (D.

Or. 1999).

Add:

In fact, Dr. Patterson's murder may have been unrelated to abortion: He was killed in what may have been a robbery attempt five months after his poster was issued; the crime is unsolved and plaintiffs' counsel conceded that no evidence ties his murderer to any anti-abortion group. R.T. at 131, 1197.

2. Kozinski Dissent at 7147. At the end of the sentence:

The record reveals one instance where an individual Paul Hill, who is not a defendant in this case participated in the preparation of the poster depicting a physician, Dr. Britton, and then murdered him.

Append:

some seven months later.

3. Kozinski Dissent at 7147-48. After:

All others who helped to make that poster, as well as those who prepared the other posters, did not resort to violence.

Add:

And for years, hundreds of other posters circulated, condemning particular doctors with no violence ensuing. *See* R.T. at 1775-76, 1783-84, 2487, 2828.

4. Kozinski Dissent at 7151. After:

The activities for which the district court held defendants liable were unquestionably of a political nature.

Add:

There is no allegation that any of the posters in this case disclosed private information improperly obtained. We must therefore assume that the information in the posters was obtained from public sources. All defendants did was reproduce this public information in a format designed to convey a political viewpoint and to achieve political goals.

5. Kozinski Dissent at 7156. Delete footnote 7 and renumber subsequent footnotes accordingly.

A majority of the en banc panel has voted to deny the appellants' joint petition for rehearing en banc before the full court. Judges Kozinski and O'Scannlain voted to grant.

The full court has been advised of the petition for rehearing en banc before the full court, and no judge of the court has requested a vote before the full court on the appellants' joint petition for rehearing en banc before the full court. Fed. R. App. P. 35(b).

The joint petition for rehearing en banc before the full court is DENIED.

KOZINSKI, Circuit Judge, with whom Circuit Judges REINHARDT, O'SCANNLAIN, KLEINFELD and BERZON join, dissenting:

The majority writes a lengthy opinion in a vain effort to justify a crushing monetary judgment and a strict injunction against speech protected by the First Amendment. The apparent thoroughness of the opinion, addressing a variety of issues that are not in serious dispute,fn1 masks the fact that the majority utterly fails to apply its own definition of a threat, and affirms the verdict and injunction when the evidence in the record does not support a finding that defendants threatened plaintiffs.

After meticulously canvassing the caselaw, the majority correctly distills the following definition of a true threat: "a statement which, in the entire context and under all the

circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a *serious expression of intent to inflict bodily harm* upon that person." Maj. op. at 28a (emphasis added).fn2 The emphasized language is crucial, because it is not illegal and cannot be made so merely to say things that would frighten or intimidate the listener. For example, when a doctor says, "You have cancer and will die within six months," it is not a threat, even though you almost certainly will be frightened. Similarly, "Get out of the way of that bus" is not a threat, even though it is said in order to scare you into changing your behavior. By contrast, "If you don't stop performing abortions, I'll kill you" is a true threat and surely illegal.

The difference between a true threat and protected expression is this: A true threat warns of violence or other harm that the speaker controls. Thus, when a doctor tells a patient, "Stop smoking or you'll die of lung cancer," that is not a threat because the doctor obviously can't cause the harm to come about. Similarly, "If you walk in that neighborhood late at night, you're going to get mugged" is not a threat, unless it is clear that the speaker himself (or one of his associates) will be doing the mugging.

In this case, none of the statements on which liability was premised were overtly threatening. On the contrary, the two posters and the web page, by their explicit terms, foreswore the use of violence and advocated lawful means of persuading plaintiffs to stop performing abortions or punishing them for continuing to do so. Nevertheless, because context matters, the statements could reasonably be interpreted as an effort to intimidate plaintiffs into ceasing their abortion-related activities. If that were enough to strip the speech of First Amendment protection, there would be nothing left to decide. But the Supreme Court has told us that "[s]peech does not lose its protected character . . . simply because it may embarrass others *or coerce them into action.*" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (emphasis added). In other words, some forms of intimidation enjoy constitutional protection.

Only a year after *Claiborne Hardware*, we incorporated this principle into our circuit's true threat jurisprudence. Striking down as overbroad a Montana statute that made it a crime to communicate to another "a threat to . . . commit a criminal offense," we stated: "The mere fact that communication induces or 'coerces' action in others does not remove it from first amendment protection." *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir. 1983) (quoting *Claiborne Hardware*, 458 U.S. at 911). We noted referring to *Claiborne Hardware* again - that the statute criminalized pure speech designed to alter someone else's conduct, so that a "civil rights activist who states to a restaurant owner, 'if you don't desegregate this restaurant I am going to organize a boycott' could be punished for the mere statement, even if no action followed." *Id.* at 1442. *Claiborne Hardware* and *Wurtz* hold that statements that are intimidating, even coercive, are protected by the First Amendment, so long as the speaker does not threaten that he, or someone acting in concert with him, will resort to violence if the warning is not heeded.

The majority recognizes that this is the standard it must apply, yet when it undertakes the critical task of canvassing the record for evidence that defendants made a true threat - a task the majority acknowledges we must perform de novo, Maj. op at 19a-20a its opinion fails to come up with any proof that defendants communicated an intent to inflict bodily harm upon plaintiffs.

Buried deep within the long opinion is a single paragraph that cites evidence supporting the finding that the two wanted posters prepared by defendants constituted a true threat. Maj. op at 32a; *see also id.* at 39a-41a (same analysis). The majority does not point to any statement by defendants that they intended to inflict bodily harm on plaintiffs, nor is there any evidence that defendants took any steps whatsoever to plan or carry out physical violence against anyone. Rather, the majority relies on the fact that "the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and

Patterson was killed after his poster was released." *Id.* at 32a; *see also id.* at 39a-41a. But neither Dr. Gunn nor Dr. Patterson was killed by anyone connected with the posters bearing their names. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1134-35 (D. Or. 1999). In fact, Dr. Patterson's murder may have been unrelated to abortion: He was killed in what may have been a robbery attempt five months after his poster was issued; the crime is unsolved and plaintiffs' counsel conceded that no evidence ties his murderer to any anti-abortion group. R.T. at 131, 1197.

The record reveals one instance where an individual - Paul Hill, who is not a defendant in this case - participated in the preparation of the poster depicting a physician, Dr. Britton, and then murdered him some seven months later. All others who helped to make that poster, as well as those who prepared the other posters, did not resort to violence. And for years, hundreds of other posters circulated, condemning particular doctors with no violence ensuing. *See* R.T. at 1775-76, 1783-84, 2487, 2828. There is therefore no pattern showing that people who prepare wanted-type posters then engage in physical violence. To the extent the posters indicate a pattern, it is that almost all people engaged in poster-making were non-violent.fn3

The majority tries to fill this gaping hole in the record by noting that defendants "kn[ew] the fear generated among those in the reproductive health services community who were singled out for identification on a 'wanted'-type poster." Maj. op at 32a. But a statement does not become a true threat because it instills fear in the listener; as noted above, many statements generate fear in the listener, yet are not true threats and therefore may not be punished or enjoined consistent with the First Amendment. *See* pp. 53a-54a *supra*. In order for the statement to be a threat, it must send the message that the speakers themselves or individuals acting in concert with them will engage in physical violence. The majority's own definition of true threat makes this clear. Yet the opinion points to no evidence that defendants who

prepared the posters would have been understood by a reasonable listener as saying that *they* will cause the harm.

Plaintiffs themselves explained that the fear they felt came, not from defendants, but from being singled out for attention by abortion protesters across the country. For example, plaintiff Dr. Elizabeth Newhall testified, "I feel like my risk comes from being identified as a target. And . . . all the John Salvis in the world know who I am, and that's my concern."fn4 *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, No. CV-95-01671-JO, at 302 (D. Or. Jan. 8, 1999); see also id. at 290 ("[U]p until January of '95, I felt relatively diluted by the you know, in the pool of providers of abortion services. I didn't feel particularly visible to the people who were you know, to the John Salvis of the world, you know. I sort of felt one of a big, big group."). Likewise, Dr. Warren Martin Hem, another plaintiff, testified that when he heard he was on the list, "I was terrified. [I]t's hard to describe the feeling that that you are on a list of people - to who have been brought to public attention in this way. I felt that this was a - a list of doctors to be killed." *Planned Parenthood*, No. CV-95-01671-JO, at 625 (Jan. 11, 1999).

From the point of view of the victims, it makes little difference whether the violence against them will come from the makers of the posters or from unrelated third parties; bullets kill their victims regardless of who pulls the trigger. But it makes a difference for the purpose of the First Amendment. Speech - especially political speech, as this clearly was - may not be punished or enjoined unless it falls into one of the narrow categories of unprotected speech recognized by the Supreme Court: true threat, *Watts v. United States*, 394 U.S. 705, 707 (1969), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), conspiracy to commit criminal acts, *Scales v. United States*, 367 U.S. 203, 229 (1961), fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942), etc.

Even assuming that one could somehow distill a true threat from the posters themselves, the majority opinion is still fatally defective because it contradicts the central holding of *Claiborne Hardware*: Where the speaker is engaged in public political speech, the public statements themselves cannot be the sole proof that they were true threats, unless the speech directly threatens actual injury to identifiable individuals. Absent such an unmistakable, specific threat, there must be evidence *aside from the political statements themselves* showing that the public speaker would himself or in conspiracy with others inflict unlawful harm. 458 U.S. at 932-34. The majority cites not a scintilla of evidence - other than the posters themselves - that plaintiffs or someone associated with them would carry out the threatened harm.

Given this lack of evidence, the posters can be viewed, at most, as a call to arms for *other* abortion protesters to harm plaintiffs. However, the Supreme Court made it clear that under *Brandenburg*, encouragement or even advocacy of violence is protected by the First Amendment: "[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Claiborne Hardware*, 458 U.S. at 927 (citing *Brandenburg*, 395 U.S. at 447) (emphasis in the original).fn5 *Claiborne Hardware* in fact goes much farther; it cautions that where liability is premised on "politically motivated" activities, we must "examine critically the basis on which liability was imposed." *Id.* at 915. As the Court explained, "Since respondents would impose liability on the basis of a public address - which predominantly contained highly charged political rhetoric lying at the core of the First Amendment - we approach this suggested basis for liability with extreme care." *Id.* at 926-27. This is precisely what the majority does *not* do; were it to do so, it would have no choice but to reverse.

The activities for which the district court held defendants liable were unquestionably of a political nature. There is no allegation that any of the posters in this case disclosed private information improperly obtained. We must therefore

assume that the information in the posters was obtained from public sources. All defendants did was reproduce this public information in a format designed to convey a political viewpoint and to achieve political goals. The "Deadly Dozen" posters and the "Nuremberg Files" dossiers were unveiled at political rallies staged for the purpose of protesting *Roe v. Wade*, 410 U.S. 1 13 (1973). Similarly, defendants presented the poster of Dr. Crist at a rally held on the steps of the St. Louis federal courthouse, where the *Dred Scott* decision was handed down, in order to draw a parallel between "blacks being declared property and unborn children being denied their right to live." *Planned Parenthood*, CV-95-01671-JO, at 2677 (Jan. 22, 1999). The Nuremberg Files website is clearly an expression of a political point of view. The posters and the website are designed both to rally political support for the views espoused by defendants, and to intimidate plaintiffs and others like them into desisting abortion-related activities. This political agenda may not be to the liking of many people - political dissidents are often unpopular - but the speech, including the intimidating message, does not constitute a direct threat because there is no evidence other than the speech itself that the speakers intend to resort to physical violence if their threat is not heeded.

In determining whether the record here supports a finding of true threats, not only the reasoning but also the facts of Claiborne Hardware are highly relevant. *Claiborne Hardware* arose out of a seven-year effort (1966 to 1972) to obtain racial justice in Claiborne County, Mississippi. Claiborne Hardware, 458 U.S. at 898. The campaign employed a variety of tactics, one among them being the boycotting of white merchants. *Id.* at 900. The boycott and other concerted activities were organized by the NAACP, in the person of its Mississippi field secretary Charles Evers, as well as by other black organizations and leaders. *Id.* at 898-900.

In order to persuade or coerce recalcitrant blacks to join the boycott, the organizers resorted to a variety of enforcement mechanisms. These included the posting of store watchers outside the boycotted stores. These watchers, also known as

"Black Hats" or "Deacons," would "identif[y] those who traded with the merchants." *Id.* at 903.fn6 The names were collected and "read aloud at meetings at the First Baptist Church and published in a local black newspaper." *Id.* at 909. Evers made several speeches containing threats - including those of physical violence - against the boycott violators. *Id.* at 900 n.28, 902, 926-27. In addition, a number of violent acts - including shots fired at individuals' homes - were committed against the boycott breakers. *Id.* at 904-06.

The lawsuit that culminated in the *Claiborne Hardware* opinion was brought against scores of individuals and several organizations, including the NAACP. The state trial court found defendants liable in damages and entered "a broad permanent injunction," which prohibited the defendants from engaging in virtually all activities associated with the boycott, including picketing and using store watchers. *Id.* at 893. The Mississippi Supreme Court affirmed, finding liability based on a variety of state law theories, some of which had as their gravamen the use of force or threat of force by those engaged in the boycott. *Id.* at 894-95.

The United States Supreme Court began its opinion in *Claiborne Hardware* by noting that "[t]he term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies" and that "certain joint activities have a 'chameleon-like' character." *Id.* at 888. The Claiborne County boycott, the Court noted, "had such a character; it included elements of criminality and elements of majesty." *Id.* The Court concluded that the state courts had erred in ascribing to all boycott organizers illegal acts - including violence and threats of violence - of some of the activists. The fact that certain activists engaged in such unlawful conduct, the Court held, could not be attributed to the other boycott organizers, unless it could be shown that the latter had personally committed or authorized the unlawful acts. *Id.* at 932-34.

In the portion of *Claiborne Hardware* that is most relevant to our case, *id.* at 927-32, the Court dealt with the liability of the

NAACP as a result of certain speeches made by Charles Evers. In these speeches, Evers seemed to threaten physical violence against blacks who refused to abide by the boycott, saying that:

- the boycott organizers knew the identity of those members of the black community who violated the boycott, *id.* at 900 n.28;
- discipline would be taken against the violators, *id.* at 902, 927;
- "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck," *id.* at 902;
- "the Sheriff could not sleep with boycott violators at night" in order to protect them, *id.*;
- "blacks who traded with white merchants would be answerable to him," *id.* at 900 n.28 (emphasis in the original).

These statements, the Supreme Court recognized, "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended." *Id.* at 927 (emphasis added). Noting that such statements might not be constitutionally protected, the Court proceeded to consider various exceptions to the rule that speech may not be prohibited or punished.

The Court concluded that the statements in question were not "fighting words" under the rule of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942); nor were they likely to cause an immediate panic, under the rule of *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."). *Id.* at 927. Nor was the speech in question an incitement under *Brandenburg v. Ohio*, 395 U.S. 444 (1969), because it resulted

in no immediate harm to anyone. *Id.* at 927-28. The Court also cited, and found inapplicable, its one case that had held "true threats" were not constitutionally protected, *Watts v. United States*, 394 U.S. 705, 705 (1969). *Id.* at 928 n.71. The mere fact that the statements could be understood "as intending to create a fear of violence," *id.* at 927, was insufficient to make them "true threats" under *Watts*.

The Court then considered the theory that the speeches themselves - which suggested violence against boycott violators - might constitute authorization or encouragement of unlawful activity, but flatly rejected it. *Id.* at 929. The Court noted that the statements were part of the "emotionally charged rhetoric of Charles Evers' speeches," and therefore could not be viewed as authorizing lawless action, even if they literally did so: "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." *Id.* at 928. Absent "evidence - apart from the speeches themselves - that Evers authorized . . . violence" against the boycott breakers, neither he nor the NAACP could be held liable for, or enjoined from, speaking. *Id.* at 929. In other words, even when public speech sounds menacing, even when it *expressly* calls for violence, it cannot form the basis of liability unless it amounts to incitement or directly threatens actual injury to particular individuals.

While set in a different time and place, and involving a very different political cause, *Claiborne Hardware* bears remarkable similarities to our case:

. Like *Claiborne Hardware*, this case involves a concerted effort by a variety of groups and individuals in pursuit of a common political cause. Some of the activities were lawful, others were not. In both cases, there was evidence that the various players communicated with each other and, at times, engaged in concerted action. The

Supreme Court, however, held that mere association with groups or individuals who pursue unlawful conduct is an insufficient basis for the imposition of liability, unless it is shown that the defendants actually participated in or authorized the illegal conduct.

- Both here and in *Claiborne Hardware*, there were instances of actual violence that followed heated rhetoric. The Court made clear, however, that unless the violence follows *promptly* after the speeches, thus meeting the stringent *Brandenburg* standard for incitement, no liability could be imposed on account of the speech.

- The statements on which liability was premised in both cases were made during the course of political rallies and had a coercive effect on the intended targets. Yet the Supreme Court held in *Claiborne Hardware* that coercion alone could not serve as the basis for liability, because it had
- not been shown - by evidence aside from the political speeches themselves - that defendants or their agents were involved in or authorized actual violence.

- In *Claiborne Hardware*, the boycott organizers gathered facts - the identity of those who violated the boycott - and publicized them to the community by way of speeches and a newspaper. As in our case, this ostentatious gathering of information, and publication thereof, were intended to put pressure on those whose names were publicized, and perhaps put them in fear that they will become objects of violence by members of the community. Yet the Supreme Court held that this could not form the basis for liability.

To the extent *Claiborne Hardware* differs from our case, the difference makes ours a far weaker case for the imposition of liability. To begin with, Charles Evers's speeches in *Claiborne Hardware* explicitly threatened physical violence. Referring to the boycott violators, Evers repeatedly went so far as to

say that "we," presumably including himself, would "break your damn neck." 458 U.S. at 902. In our case, the defendants never called for violence at all, and certainly said nothing suggesting that they personally would be involved in any violence against the plaintiffs.

Another difference between the two cases is that the record in *Claiborne Hardware* showed a concerted action between the boycott organizers, all of whom operated within close physical proximity in a small Mississippi county. By contrast, there is virtually no evidence that defendants had engaged in any concerted action with any of the other individuals who prepared "wanted" posters in the past.fn7

The most striking difference between the two cases is that one of Evers's speeches in *Claiborne Hardware*, which expressly threatened violence against the boycott violators, was in fact followed by violence; he then made additional speeches, again referring to violence against boycott breakers. 458 U.S. at 900 (April 1966 speech), 902 (April 1969 speeches).fn8 By contrast, the record here contains no evidence that violence was committed against any doctor after his name appeared on defendants' posters or web page.fn9

The opinion's effort to distinguish Claiborne Hardware does not bear scrutiny. The majority claims that in Claiborne Hardware, "there was no context to give the speeches (including the expression 'break your neck') the implication of . . directly threatening unlawful conduct." Maj. op. at 24a-25a. As explained above, the majority is quite wrong on this point, *see* pp. 8a-9a *supra*, but it doesn't matter anyway: Evers's statements were threatening on their face. Not only did he speak of breaking necks and inflicting "discipline," he used the first person plural "we" to indicate that he himself and those associated with him would be doing the neck-breaking, 458 U.S. at 902, and he said that "blacks who traded with white merchants would be *answerable to him*," id. at 900 n.28 (emphasis in the original).

It is possible - as the majority suggests - that Evers's statements were "hyperbolic vernacular," Maj. op. at 25a,fn10 but the trier of fact in that case found otherwise. The Supreme Court nevertheless held that the statements ought to be treated as hyperbole because of their political content. By any measure, the statements in our case are far less threatening on their face, yet the majority chooses to defer to the jury's determination that they were true threats.

The majority also relies on the fact that the posters here "were publicly distributed, but personally targeted." Maj. op. at 40a. But the threats in *Claiborne Hardware* were also individually targeted. Store watchers carefully noted the names of blacks who entered the boycotted stores, and those names were published in a newspaper and read out loud at the First Baptist Church, where Evers delivered his speeches. 458 U.S. at 903-04. When speaking of broken necks and other discipline, Evers was quite obviously referring to those individuals who had been identified as defying the boycott; in fact, he stated explicitly that he knew their identity and that they would be answerable to him. *Id.* at 900 n.28. The majority's opinion simply cannot be squared with Claiborne Hardware.

Claiborne Hardware ultimately stands for the proposition that those who would punish or deter protected speech must make a very substantial showing that the speech stands outside the umbrella of the First Amendment. This message was reinforced recently by the Supreme Court in *Ashcroft v. Free Speech Coalition*, No. 00-795, 2002 WL 552476 (U.S. Apr. 16, 2002), where the government sought to prohibit simulated child pornography without satisfying the stringent requirements of *Miller v. California*, 413 U.S. 15 (1973). The Court rejected this effort, even though the government had earnestly argued that suppression of the speech would advance vital legitimate governmental interests, such as avoiding the exploitation of real children and punishing producers of real child pornography. *See id.* at *11 - *13 ; *see also id.* at *16 (Thomas, J., concurring in the judgment); *id.* at *17 - *18 (O'Connor, J., concurring in the judgment in part

and dissenting in part); *id.* at *21 (Rehnquist, C.J., dissenting). The Court held that the connection between the protected speech and the harms in question is simply too "contingent and indirect" to warrant suppression. *Id.* at 10; *see also id.* at *12 ("The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."). As Judge Berzon notes in her inspired dissent, defendants' speech, on its face, is political speech on an issue that is at the cutting edge of moral and political debate in our society, *see* Berzon Dissent at 75a-76a, and political speech lies far closer to the core of the First Amendment than does simulated child pornography. "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Free Speech Coalition*, 2002 WL 552476, at *12. If political speech is to be deterred or punished, the rationale of *Free Speech Coalition* requires a far more robust and direct connection to unlawful conduct than these plaintiffs have offered or the majority has managed to demonstrate. The evidence that, despite their explicitly non-threatening language, the Deadly Dozen poster and the Nuremberg Files website were true threats is too "contingent and indirect" to satisfy the standard of *Free Speech Coalition.*

The cases on which the majority relies do not support its conclusion. *United States v. Hart*, 212 F.3d 1067 (8th Cir. 2000), is a case where the communication did not merely threaten harm in the future, but was itself perceived as dangerous. The defendant there parked two Ryder trucks in the driveway of an abortion clinic, as close to the building as possible. *Hart*, 212 F.3d at 1069, 1072. Given the association of Ryder trucks with the Oklahoma City bombing, and the timing and location of the incident, the trucks could reasonably be suspected of containing explosives. They were much like mailing a parcel containing a ticking clock or an envelope leaking white powder. The threat in Hart came not from the message itself, but from the potentially dangerous medium used to deliver it.

To make *Hart* even remotely analogous to our case, the defendant there would have had to be picketing abortion clinics with a placard depicting a Ryder truck. We know that the Eighth Circuit would not have permitted the imposition of liability in that situation because of the careful manner in which it circumscribed its holding. The court noted that the trucks were parked in a driveway of the abortion clinic, near the entrance, rather than on the street, and that the incident was timed to coincide with a visit by the President to the area, which heightened security concerns. *Id.* at 1072. In light of these facts, a reasonable person could believe that the trucks might be filled with explosives, which would not have been the case, had defendant merely carried a placard with a picture of a Ryder truck. In our case, the defendants merely displayed posters at locations nowhere near the plaintiffs' homes or workplaces. The threat, if any there was, came not from the posters themselves, but from the effect they would have in rousing others to take up arms against the plaintiffs. *Hart* has no relevance whatsoever to our case.

Nor does *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), a case involving repeated face-to-face confrontations between the defendant and the targets of her harangues, help the majority. Dinwiddie, a pro-life activist, stood outside Dr. Crist's abortion clinic and shouted various threats through a bullhorn, making it clear that she herself intended to carry them out. As Dinwiddie told one of Dr. Crist's co-workers: "[Y]ou have not seen violence yet until you see what *we* do to you." *Id.* at 925 (emphasis added). Where the speaker directly confronts her target and expressly states that she is among those who will carry out the violence, it is hardly surprising when the court finds that there has been a true threat.fn11

We have recognized that statements communicated directly to the target are much more likely to be true threats than those, as here, communicated as part of a public protest. Our caselaw also instructs that, in deciding whether the coercive speech is protected, it makes a big difference whether it is contained in a private communication - a face-to-face confrontation, a telephone call, a dead fish wrapped in

newspaperfn12 - or is made during the course of public discourse. The reason for this distinction is obvious: Private speech is aimed only at its target. Public speech, by contrast, seeks to move public opinion and to encourage those of like mind. Coercive speech that is part of public discourse enjoys far greater protection than identical speech made in a purely private context. We stated this clearly in *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214 (9th Cir. 1990), where, relying on *Brandenburg*, *Claiborne Hardware* and *Wurtz*, we allowed "public speeches advocating violence" substantially more leeway under the First Amendment than "privately communicated threats." *McCalden*, 955 F.2d at 1222.fn13

We reaffirmed the importance of the public-private distinction in *Melugin v. Hames*, 38 F.3d 1478 (9th Cir. 1994). Finding a death threat communicated to a magistrate judge by mail to be a "true threat," we expressly distinguished between "[t]he 'threat' in *Watts* against President Johnson [which] was made during a public political rally opposing the Vietnam War" and defendant's threats, which "were directed in a private communication to a state judicial officer with the intent to obtain an immediate jury trial." *Id.* at 1484 (footnote omitted) (emphasis added).

In *Bauer v. Sampson*, 261 F.3d 775 (9th Cir. 2001), two members of today's majority emphasized the importance of the public character of speech in deciding whether it constitutes a "true threat." *Bauer* involved a college professor who published an underground campus newsletter containing threatening criticism of the college's board of trustees.fn14 Noting that "[e]xpression involving a matter of public concern enjoys robust First Amendment protection," the opinion states that "although [the] writings have some violent content," the fact that they were made "in an underground campus newspaper in the broader context of especially contentious campus politics" rendered them a "hyperbole" and not a "true threat." *Id.* at 783-84.fn15 The majority seems perfectly willing to have this court treat expressly violent statements by Charles Evers and Roy Bauer as hyperbole, but to hold the entirely *non-violent* statements by defendants to

be true threats.

Finally, a word about the remedy. The majority affirms a crushing liability verdict, including the award of punitive damages, in addition to the injunction.fn16 An injunction against political speech is bad enough, but the liability verdict will have a far more chilling effect. Defendants will be destroyed financially by a huge debt that is almost certainly not dischargeable in bankruptcy; it will haunt them for the rest of their lives and prevent them from ever again becoming financially self-sufficient. The Supreme Court long ago recognized that the fear of financial ruin can have a seriously chilling effect on all manner of speech, and will surely cause other speakers to hesitate, lest they find themselves at the mercy of a local jury. *See N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 277-79 (1964). The lesson of what a local jury has done to defendants here will not be lost on others who would engage in heated political rhetoric in a wide variety of causes.

In that regard, a retrospective liability verdict is far more damaging than an injunction; the latter at least gives notice of what is prohibited and what is not. The fear of liability for damages, and especially punitive damages, puts the speaker at risk as to what a jury might later decide is a true threat, and how vindictive it might feel towards the speaker and his cause. In this case, defendants said nothing remotely threatening, yet they find themselves crucified financially. Who knows what other neutral statements a jury might imbue with a menacing meaning based on the activities of unrelated par-ties. In such circumstances, it is especially important for an appellate court to perform its constitutional function of reviewing the record to ensure that the speech in question clearly falls into one of the narrow categories that is unprotected by the First Amendment. The majority fails to do this.

While today it is abortion protesters who are singled out for punitive treatment, the precedent set by this court the broad and uncritical deference to the judgment of a jury will haunt dissidents of all political stripes for many years to come.

Because this is contrary to the principles of the First Amendment as explicated by the Supreme Court in *Claiborne Hardware* and its long-standing jurisprudence stemming from *Brandenburg v. Ohio*, I respectfully dissent.

Footnotes

fn1 For example, it is clear that context may be taken into account in determining whether something is a true threat, an issue to which the majority devotes 16 pages. *See* Maj. op. at 19a-26a, 29a-33a. Nor is there a dispute that someone may be punished for uttering threats, even though he has no intent to carry them out, *see id.* at 26a-27a, or that we defer to the fact-finder on questions of historical fact in First Amendment cases, *id.* at 14a-15a.

fn2 Although the majority's definition does not specify *who* is to inflict the threatened harm, use of the active verb "inflict" rather than a passive phrase, such as "will be harmed," strongly suggests that the speaker must indicate he will take an active role in the inflicting. Recent academic commentary supports the view that this requirement is an integral component of a "true threat" analysis. *See* Steven G. Gey, The *Nuremberg Files and the First Amendment Value of Threats*, 78 Tex. L. Rev. 541, 590 (2000) (part of what "separates constitutionally unprotected true threats from constitutionally protected *Claiborne Hardware*-style political intimidation is [that] the speaker communicates the intent to carry out the threat person-ally or to cause it to be carried out"); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 289 (2001) ("determining what is a true threat [should] require[ ] proof that the speaker explicitly or implicitly suggest that he or his co-conspirators will be the ones to carry out the threat").

fn3 The majority so much as admits that the Nuremberg Files website does not constitute a threat because of the large number of people listed there. Maj. op. at 32a-33a. The majority does point out that doctors were listed separately, and that the names of doctors who were killed or wounded were stricken or greyed out, *id.* at 32a-33a, but does not

explain how this supports the inference that the posting of the website in any way indicated that *defendants* intended to inflict bodily harm on plaintiffs. At most, the greying out and strikeouts could be seen as public approval of those actions, and approval of past violence by others cannot be made illegal consistent with the First Amendment. *See Hess v. Indiana*, 414 U.S. 105, 108-09 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 237-38 (1963); *Noto v. United States*, 367 U.S. 290, 297-99 (1961).

fn4 In December 1994, John Salvi killed two clinic workers and wounded five others in attacks on two clinics in Brookline, Massachusetts; Salvi later fired shots at a clinic in Norfolk, Virginia before he was apprehended. *See Planned Parenthood*, 41 F. Supp. 2d at 1135-36. Salvi is not a defendant in this case and, as far as the record reveals, was not engaged in the preparation of any posters.

fn5 Under *Brandenburg*, advocacy can be made illegal if it amounts to incitement. But incitement requires an immediacy of action that simply does not exist here, which is doubtless why plaintiffs did not premise their claims on an incitement theory.

fn6 It would appear that in the small Mississippi community in Claiborne County, black residents knew each other on sight.

fn7 The closest connection the district court could find between defendants and any of these individuals was a visit paid by two defendants, Andrew Burnett and Catherine Ramey, to John Burt, a maker of such posters. At that meeting, they "discussed 'wanted' posters." *Planned Parenthood*, 41 F. Supp. 2d at 1135. The district court did not find that defendants participated in the preparation of Burt' s posters, nor that they otherwise engaged in concerted activities with other abortion protesters.

fn8 0n April 1, 1966, Evers made a speech "directed to all

8,000-plus black residents of Claiborne County," where he said that "blacks who traded with white merchants would be *answerable to him*" and that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." Claiborne Hardware, 458 U.S. at 900 n.28 (emphasis in the original). Later that year, violence was, indeed, committed against blacks who refused to join the boycott. Id. at 928. In April 1969, Evers reiterated his message in two other speeches, saying that "boycott violators would be 'disciplined' by their own people" and that " 'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.' " *Id.* at 902.

fn9 The majority mentions that "[o]ne of the . . . doctors on the Deadly Dozen poster had in fact been shot before the poster was published." Maj. op. at 40a. The physician in question, Dr. Tiller, was shot and wounded in August 1993, a year and a half before the Deadly Dozen poster was unveiled. *Planned Parenthood*, 41 F. Supp. 2d at 1131-32, 1135. The majority does not explain how including Dr. Tiller's name on the Deadly Dozen poster contributed to the poster's threatening message. To the extent it is relevant at all, inclusion of Dr. Tiller's name cuts the other way because it goes counter to the supposed pattern that the majority is at such pains to establish, namely that listing of a name on a poster was followed by violence against that person. As to Dr. Tiller, that order is obviously reversed.

fn10 In support of this claim, the majority states that there was no "indication that Evers's listeners took his statement that boycott breakers' 'necks would be broken' as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores." Maj. op. at 25a. The majority extrapolates this conclusion from only four out of ten incidents of boycott-related violence cited in *Claiborne Hardware*. *See* 458 U.S. at 904-06. Although these were the four incidents about which the most information was available - perhaps because these four particular victims were not afraid to lodge a complaint or to come forward and testify - they alone are hardly sufficient to support a conclusion that

Evers's audience largely ignored his warnings.

fn11 Even then, *Dinwiddie* is instructive for the restraint it exercised in granting relief Dinwiddie was not subjected to a crushing and punitive award of damages, and the injunction against her was narrowly drawn and carefully tailored to accommodate her legitimate interests, including her interest in free expression. She was not banned from all speech of a certain kind, but only from speech that expressly violates the Freedom of Access to Clinic Entrances Act or is delivered through a bullhorn within 500 feet of an abortion clinic. *Dinwiddie*, 76 F.3d at 928-29. The Eighth Circuit emphasized that "[t]he types of activity that the injunction would proscribe are quite narrow," and that Dinwiddie would be free to "carry signs, distribute literature, and speak at a reasonable volume even when she is within 500 feet of an abortion clinic." *Id.* By contrast, the injunction in our case indefinitely bars defendants from publishing, reproducing, distributing (and even owning) the posters, the website or anything similar, anywhere in the United States. *Planned Parenthood*, 41 F. Supp. 2d at 1155-56.

fn12 *See The Godfather* (Paramount Pictures 1972).

fn13 In my dissent from the failure to take McCalden en banc, I argued that this distinction was inapposite in McCalden because the statement involved - a warning by Holocaust survivors that they will disrupt an exhibit by a Holocaust revisionist with a demonstration - could not be characterized as a threat, even if communicated in private. *McCalden*, 955 F.2d at 1229 (Kozinski, J., dissenting from denial of rehearing en banc). I did not, of course, disagree with *McCalden's* holding that public statements are entitled to more protection than private ones.

fn14 These writings included a reference to a "two-ton slate of polished granite" that defendant "hope[d to] drop" on the college president; a comment that "no decent person could resist the urge to go postal" at a meeting of the board; a fantasy description of a funeral for one of the trustees; and

creating "a satisfying acronym: MAIM" from the college president's name. *Bauer*, 261 F.3d at 780.

fn15 In fact, *no* prior case in our circuit has ever found statements charged with political content and delivered in a public arena to be true threats. See, in addition to the cases already cited, *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996) (finding a "true threat" where a student directly threatened to kill the school counselor in her own office); *United States v. Gordon*, 974 F.2d 1110 (9th Cir. 1992) (imposing liability where defendant entered former President Reagan's house and, when apprehended, repeatedly asserted his wish to kill the President); *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990) (holding that defendant's statements to an INS agent, delivered face-to-face and by phone, that the agent "will pay" for defendant's arrest, were "true threats"); *United States v. Gilbert*, 884 F.2d 454 (9th Cir. 1989) (finding a true "threat" where a white supremacist mailed a threatening letter and several posters directly to the founder of an adoption agency that placed minority children with white families); *United States v. Mitchell*, 812 F.2d 1250 (9th Cir. 1987) (finding a "true threat" where defendant, when questioned by customs officials and Secret Service agents in isolation, repeatedly threatened to kill President Reagan); *United States v. Merrill*, 746 F.2d 458, 460 (9th Cir. 1984) (finding a "true threat" where defendant mailed to several individuals "letters [with] macabre and bloody depictions of President Reagan along with the words 'Kill Reagan' "); *Roy v. United States*, 416 F.2d 874, 876 & n.6 (9th Cir. 1969) (finding that a statement by a marine to the telephone operator that he is "going to get" arriving President Johnson constitutes a threat, but suggesting that its decision could have been different if the "words were stated in a political . . . context").

fn16 Although the majority remands the award of punitive damages, such award is affirmed unless grossly disproportionate. *See In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir. 2001).

Section 248. Freedom of access to clinic entrances

(a) Prohibited Activities. - Whoever -

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties. - Whoever violates this section shall -

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not

more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil Remedies. -

(1) Right of action. -

(A) In general. - Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief. - In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

(2) Action by Attorney General of the United States. -

(A) In general. - If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief. - In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory

damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent -

(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

(ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

(3) Actions by State Attorneys General. -

(A) In general. - If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief. - In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of Construction. - Nothing in this section shall be construed -

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions. - As used in this section:

(1) Facility. - The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with. - The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate. - The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction. - The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services. - The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State. - The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

Section 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section -

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Section 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Section 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE
COLUMBIA/WILLAMETTE, INC.; ET AL.,
Plaintiffs,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ET AL.,
Defendants.

Filed February 2, 1999

VERDICT (Relevant Parts)

1. Is the "Deadly Dozen" poster a true threat by one or more of the defendants to bodily harm, assault, or kill any of the plaintiffs?

YES

2. Is the Crist poster a true threat by one or more of the defendants to bodily harm, assault, or kill any of the plaintiffs?

YES

3. Are the Nuremberg Files a true threat by one or more of the defendants to bodily harm, assault or kill any of the plaintiffs?

YES

If you answered "yes" to any of the above, please proceed to

the next section. Otherwise, please put the presiding juror's number on the signature line, date this form, and notify the courtroom deputy that you have reached a verdict.

The foregoing is the unanimous verdict of this Jury in the matter of Planned Parenthood, et at v. American Coalition, et at, Civil No. 95-1671-JO.

DATED this 2nd day of Feb. 1999.

14
PRESIDING JUROR NO.

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE
COLUMBIA/WILLAMETTE, INC.; ET AL.,
Plaintiffs,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ET AL.,
Defendants.

SELECTED Court's FINAL JURY INSTRUCTIONS

As of 26 Jan. 99

Definition of Threat

A statement is a "true threat" when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault. This is an objective standard - that of a reasonable person. Defendants' subjective intent or motive is not the standard that you must apply in this case. In other words, even if you believe that the defendants did not intend the statements to be threatening, you must still find those statements to be threats if you conclude that a reasonable person would have foreseen that those statements, in their entire factual context, would have been interpreted as statements of an intent to bodily harm or assault.

Whether one or more of the defendants made statements that are threats is a matter for you, the jury, to decide. In making this determination, you should consider the total context and

circumstances under which the statements were made. The word "context" means all of the facts and information that would have been known to the person making the statement, including the events surrounding each publication of the statement and the reaction of the listeners to it. The context in this case may include the other posters you heard about, other statements and actions by the defendants and others, the history of anti-abortion violence, and the reaction of the listeners. Plaintiffs, of course, have the burden of proving which of these alleged contextual facts and circumstances were within the knowledge of the defendants. The context also includes evidence of the defendants' motives or intent in creating, preparing or disseminating the statements at issue. In evaluating context, you should also consider evidence presented by the defense of non-violence and permissive exercise of free speech.

I remind you, however, that plaintiffs' claims are based only on the three statements I have listed for you. The evidence concerning other posters, other statements and actions, history of violence, including the violent actions of others you have heard evidence about, and defendants' subjective motives are admissible to show the context or circumstances in which the defendants allegedly made the statements, and which you must consider in determining whether a reasonable person should have foreseen that any of the three statements at issue would be interpreted as threats.

Even a statement that is ambiguous, subtle or conditional can amount to a threat in light of the factual context in which the statement was made. Further, you need not find that the defendants intended to carry out the threat or were even capable of carrying out the threat in order to find that a statement was, in fact, a threat. Nor must you find that any of the defendants actually intended to threaten plaintiffs, so long as you find that a reasonable person would have foreseen that it would be understood to be threatening.

If you find that any of the defendants' alleged statements, in context, were "true threats," then you must next determine

whether they were made in violation of FACE or RICO. If you find that plaintiffs have failed to prove any true threats, your verdict must be for the defendants and you will not proceed to evaluate the alleged FACE or RICO violations.

You have heard evidence during this trial about what the defendants were thinking or what they believed about what they were doing in creating, disseminating, or publishing the three statements alleged to be true threats. I want to make sure that you fully understand the relevance of this evidence to your deliberations on the issues in this case.

In deciding whether the statements are true threats, you may consider the evidence of what the defendants were thinking or what their motives were as part of the context you may consider in deciding what a reasonable person would foresee. This does not change the test of "true threat," as I have just instructed you: You must decide only whether a reasonable person, in the context in which the statement was made, would foresee that the person to whom the statement was communicated would interpret it to be a serious expression of an intent to inflict bodily harm or assault. In other words, the test is not the subjective view of the defendants, but the objective view of a reasonable person.

You will also consider evidence of defendants' intent in deciding other issues in the case. As I will explain in a few minutes, plaintiffs must prove defendants' intent as part of the "racketeering act" element of their RICO claims. And as I have told you several times during trial and will further instruct you, defendants' intent or malice, or lack thereof, is an element of plaintiffs' proof in their claims for punitive damages.

Claim I FACE Violation

Plaintiffs' first claim is that the defendants violated the Freedom of Access to Clinic Entrances Act, or FACE, by communicating threats of force. As pertinent to this case, FACE prohibits any person from using threats of force to

intimidate or interfere with, or attempt to intimidate or interfere with, any person's ability to provide reproduction health services, like abortions.

To show that a defendant has violated FACE, plaintiffs must prove the following three elements by a preponderance of the evidence:

(1) that the defendant made a threat of force, which threat you must have found to have been a "true threat" as I have defined it;

(2) that the plaintiff is or was involved in providing services in a facility that provides reproductive health services;

(3) that the defendant made the threat of force to intimidate or interfere with, or attempt to intimidate or interfere with, the plaintiff's or any other person's ability to obtain or provide reproductive health services.

As used in this instruction, "interfere with means to restrict a person's freedom of movement, and "intimidate" means to place a person in reasonable apprehension of bodily harm either to that person or to another. "Reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services related to pregnancy or the termination of pregnancy.

To find for a particular plaintiff on the FACE claim, you must find that a defendant used a true threat in an attempt to intimidate or interfere with a person's ability to obtain or provide reproductive health services, and that the plaintiff was aggrieved or harmed by that threat.

Conspiracy to Violate FACE

Plaintiffs also allege that the defendants conspired to violate

FACE. In order for you to find that a defendant conspired to violate FACE, you must find by a preponderance of the evidence that:

First, there was an agreement between two or more of the persons to commit acts that would violate FACE (as defined and described a moment ago);

Second, a defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy - and all jurors must agree on a particular overt act that you find was committed.

A conspiracy is a kind of partnership-an agreement of two or more persons to violate the law. The conspiracy violation is the agreement to do something unlawful; it does not matter whether the underlying unlawful act that the conspirators agreed to commit was committed. In other words, a person may be found liable for conspiring to violate FACE even if the conspiracy was not successful and no unlawful acts were actually committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the violations alleged by the plaintiffs as an object of the conspiracy with all of you agreeing as to the particular violation which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the

details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of the conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

The third requirement of a finding of conspiracy is that one member performed one overt act for the purpose of carrying out the conspiracy, and you must all agree as to what that overt act was. The overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The plaintiffs are not required to prove that the defendants personally did one of the overt acts, only that a member of the alleged conspiracy did it.

If you find that a defendant was a member of a conspiracy, that defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not that defendant knew what they said or did. This is so even if the acts were done and the statements were made in the defendant's absence and without the defendant's knowledge. On the other hand, if the acts were done or the statements were made by someone whom you did not find was a member of the conspiracy, or they were not done or said in furtherance of the conspiracy, they may be considered by you only as evidence against the person who said or did them, or as the context or background relevant to this case.

If you find that there was no conspiracy among the defendants to violate FACE, then you must return a verdict in favor of defendants on plaintiffs' FACE conspiracy claim.

Claim II- RICO Violation
Alleged Racketeering Acts (Extortion)

Plaintiffs allege that the defendants committed racketeering acts of extortion in violation of the Hobbs Act through the use of threats of force, violence, or fear. More specifically, plaintiffs claim that the defendants committed racketeering acts by creating, disseminating, and publishing the Deadly Dozen Poster, the Poster of Dr. Crist, and the Nuremberg Files, in violation of the Hobbs Act.

For you to find that a defendant committed extortion, in violation of the Hobbs Act, plaintiffs must prove by a preponderance of the evidence that:

(1) a defendant, by the use of a threat of force, violence, or fear involving the Deadly Dozen Poster, Poster of Dr. Crist, or Nuremberg Files, which you must have found to have been a "true threat" as I have defined it, deprived, attempted to deprive, or conspired to deprive a plaintiff of his or her property;

(2) that the defendant acted with intent to deprive the plaintiff of his or her property; and

(3) the defendant's actions could have affected or did affect commerce from one state to another in some way.

Each violation of the Hobbs Act by extortion, attempted extortion, or conspiracy to commit extortion, constitutes a racketeering act under RICO.

I will now instruct you further as to these elements.

Claim IV - Conspiracy to Violate RICO

I will now explain to you the law of conspiracy that is relevant to plaintiffs' RICO conspiracy claim. Whether or not you find any defendant liable under RICO, you must still consider whether that defendant agreed or conspired with

any other person or organization to violate RICO. Thus, if you find a defendant liable for violating RICO, you must also separately consider whether that defendant is liable for conspiring with others to commit acts that violate RICO. Likewise, if you find a defendant not liable for violating RICO, you must still separately consider whether that defendant is liable for conspiracy to violate RICO.

For you to find that a defendant conspired to violate RICO, plaintiffs must prove by a preponderance of the evidence that:

(1) there was an agreement between two or more persons to commit acts that would violate RICO;

(2) a defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

(3) one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy - and all jurors must agree on a particular overt act that you find was committed.

With respect to the "overt act" element of a conspiracy, the overt act does not itself have to be unlawful. A lawful act may be sufficient as an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. Additionally, the plaintiffs need not prove that a defendant personally did the overt act. But, as stated, you must all agree on the particular overt act.

As I told you earlier, a conspiracy is a kind of partnership - an agreement of two or more persons to violate the law. The conspiracy violation is the agreement to do something unlawful; it does not matter whether the compirators actually commit the underlying violation. Therefore, you may find a defendant liable for conspiring to violate RICO even if you find that the conspiracy was not successful and no racketeering acts were actually committed. In other words, if

you find that a defendant conspired to commit the racketeering acts alleged in this case, you may find him or her liable for conspiracy even though no racketeering acts actually were committed by that defendant or, for that matter, by any other defendant.

To find a conspiracy, you need not find that the alleged conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the racketeering acts alleged by the plaintiffs as an object of the conspiracy.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. It is no defense to a finding of liability for conspiracy that a defendant joins a conspiracy after it is formed.

If you find the existence of a conspiracy to violate RICO, and you find that a defendant was a member of that conspiracy, then that defendant is responsible for what the other conspirators said or did to carry out the conspiracy, whether or not that defendant knew what the other conspirators said or did. If, however, you find that there was no conspiracy among the defendants to violate RICO, then you must return a verdict in favor of defendants on plaintiffs' RICO conspiracy claim.

Supreme Court, U.S.
FILED
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No. 02-563

In the

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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November 12, 2002

QUESTION PRESENTED

Whether the Court of Appeals correctly applied settled principles of law in affirming, under the particular facts and circumstances of this case, the findings of both the jury and the District Court that petitioners, with intention to intimidate, unlawfully threatened to kill respondents.

RULE 29.6 STATEMENT

Two respondents, Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center (now known as All Women's Health Center), are non-profit corporations. Neither has a parent corporation and no publicly-held company owns 10% of either's stock.

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BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

ACLA's petition for a writ of certiorari boils down to a dispute about the particular facts of this case — facts adduced through twenty-seven witnesses at a three-week trial and reviewed independently by the *en banc* Court of Appeals. As ACLA's own petition makes clear, there is no conflict of authority as to the law of threats. Petitioners seek review simply because they disagree with the view of the facts taken by the jury, the District Court Judge and the Ninth Circuit *en banc* majority, all of whom found that petitioners, with intention to intimidate, threatened to inflict bodily injury on respondents. Petitioners' disagreement with this factual result is not a basis for Supreme Court review.

In the *en banc* decision authored by Judge Rymer, the Ninth Circuit relied on the well-settled law of threats, as to which there is no conflict of authority, and gave additional deference to petitioners' First Amendment claim by conducting a searching, independent review of the trial record to find — as the jury and District Court had found — that ACLA's statements were proscribable true threats of bodily injury. Indeed, even the dissenters agreed that the majority articulated the correct legal standard for true threats, properly considered context and correctly articulated the applicable standard of review. The dissenters merely disagreed with how those properly stated legal standards were to be applied to the particular facts of this case. Factbound disputes such as this do not merit this Court's review.

OPINIONS BELOW

The District Court's decision denying petitioners' motions to dismiss, 945 F. Supp. 1355 (D. Or. 1996), and the District Court's initial injunction, 1999 WL 65450 (D. Or. Feb. 25, 1999), are appended hereto ("Resp. App.").[1]

COUNTERSTATEMENT OF THE CASE[2]

In 1993, as anti-abortion violence became increasingly brutal, "wanted" posters targeting Dr. David Gunn, with his photograph, addresses and other personal information, were circulated where he lived and worked. On March 10, 1993, Dr. Gunn was murdered while entering his abortion clinic. Then, "wanted" posters of Dr. Wayne Patterson, another abortion provider, were circulated, with Dr. Patterson's personal identifying information. In August 1993, Dr. Patterson was murdered. Then, Paul Hill, closely-tied to petitioners, circulated "wanted" posters of Dr. John Britton, another abortion provider, containing his photograph, his home and office addresses, a physical description of him and his car, and accusing him of "crimes against humanity." On July 19, 1994, Hill murdered Dr. Britton and his volunteer escort, James Barrett, and wounded Mr. Barrett's wife, in their car outside the health clinic where Dr. Britton performed abortions. Petitioners responded to all of this by calling for the acquittal of the shooters, asserting that murdering physicians who perform abortions is

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[1] Citations to ACLA's petition and appendix are denoted as "Pet." and "Pet. App." Respondents — four physicians and two health clinics — are referred to collectively as "Physicians" and petitioners are referred to collectively as "ACLA."

[2] Respondents disagree with petitioners' statement of the facts. The "core constitutional fact" of true threats is not "undisputed." (*See* Pet. 1) The facts, summarized here, are set forth in the decision below (Pet. App. 1a-52a), the District Court's injunction (Pet. App. 132a-184a) (with record cites therein), the trial transcript ("Tr.") and the trial exhibits ("Ex.").

"justifiable," and then forming their new organization to repeat the pattern. (Pet. App. 9a-10a, 140a-142a)

Petitioners were fully aware of the poster/murder pattern and the fear in its wake — and they capitalized upon it to intimidate the living physicians by threats of bodily injury. (Pet. App. 12a) In January 1995, having split from the mainstream anti-abortion movement because it refused to endorse violence (Pet. App. 10a, 144a), petitioners unveiled, in blown-up form, their "Deadly Dozen" hit list of thirteen physicians, including three respondents, accusing them of "crimes against humanity." (Pet. App. 10a-11a, 135a-136a) The FBI and U.S. Marshals immediately contacted respondents, who, with full knowledge of the prior poster/murder pattern and petitioners' "pro-force" position, purchased bulletproof vests, wigs and disguises. (Pet App. 10a-13a, 41a, 135a-137a)

ACLA's threats continued unabated. In August 1995, ACLA released a poster of respondent Dr. Robert Crist, with his photograph and home and work addresses, declaring him "guilty of crimes against humanity" and offering a "reward." Petitioners visited Dr. Crist's St. Louis clinic to relay their threat directly.[3] Once again, petitioners succeeded in their intent to intimidate: Dr. Crist accepted law enforcement protection and undertook additional security measures to protect himself and his family. (Pet. App. 11a, 137a)

In January 1996, ACLA unveiled "the Nuremberg Files." (Pet. App. 11a) Subsequently, petitioners sent the Nuremberg Files to Neal Horsley for placement on the internet in ACLA's name. Horsley complied. (Pet. App. 11a, 137a-140a) Amidst dripping blood, crossed-out names of murdered doctors and grayed names of wounded doctors, the Nuremberg Files threatened that Physicians would be subject to punishment by "perfectly legal courts" for "various crimes to which they

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[3] Petitioners' visit to the St. Louis courthouse was not a "rally." (Pet. 2)

should answer." The Nuremberg Files contained Physicians' names, addresses and family information, and warned of a "payday someday, a day when what is sown is reaped." (Pet. App. 11a-12a, 32a, 193a-194a)[4]

Fearing for their lives and the safety of their families, respondents sued, contending that petitioners' communications to Physicians were "threats of force" in violation of federal law.[5] Relying on settled threats law under multiple federal threats statutes (on which FACE was modeled), the District Court denied ACLA's motions to dismiss and, after discovery, denied ACLA's motions for summary judgment. (Resp. App. 1a-63a; Pet. App. 185a-212a) After three weeks of trial and four days of deliberations, the jury found on a special verdict form that each of the Deadly Dozen List, Crist Poster and Nuremberg Files constituted "a true threat by one or more of the defendants to bodily harm, assault or kill any one of the plaintiffs." (Pet. App. 249a; Resp. App. 75a)[6] The jury also found that petitioners intended to intimidate Physicians,

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[4] ACLA struggles to distance itself from the Nuremberg Files by noting that Horsley, who currently maintains the website, is a non-party. It is undisputed that the Nuremberg Files were petitioners' creation. (Pet. App. 11a, 138a-140a, 175a-178a) ACLA's "Lodging" does not include the trial exhibits documenting ACLA's role in creating the Nuremberg Files or ACLA's involvement in the internet version. (*E.g.*, Exs. 4, 7B, 80) Moreover, Paul deParrie, petitioners' agent, was directly involved in the creation of the Nuremberg Files and participated in the destruction of the hardcopy Files. (Pet. App. 43a-44a, 175a-178a)

[5] Physicians sued under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, and the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, with Hobbs Act extortion, 18 U.S.C. § 1951, as the predicate acts for the RICO claim. The petition does not raise any statutory or facial challenge to either claim.

[6] Petitioners did not include the full jury verdict form, on which, in addition to the "true threat" questions, the jury assessed each claim as to each plaintiff and each defendant. (Resp. App. 75a-91a)

committed extortion and acted maliciously and in reckless disregard of Physicians' rights. (Pet. App. 42a, 254a, 257a-258a; Resp. App. 77a-90a)[7]

In enjoining petitioners from further unlawful conduct, District Judge Robert E. Jones independently found,

> by clear and convincing evidence that each defendant, acting independently and as a co-conspirator, prepared, published and disseminated the Deadly Dozen poster, the Poster of Dr. Robert Crist and the Nuremberg Files with specific intent and malice in a blatant and illegal communication of true threats to kill, assault or do bodily harm to each of the plaintiffs and with the specific intent to interfere with or intimidate the plaintiffs from engaging in legal medical practices or procedures.
>
> . . . I find the actions of the defendants in preparing, publishing and disseminating these true threats objectively and subjectively were not protected speech under the First Amendment.

(Resp. App. 65a; Pet. App. 13a) The District Court followed with additional findings of fact. (Pet. App. 132a-184a)[8]

In its findings, the District Court found both subjective and objective intent to threaten on behalf of each petitioner.

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[7] ACLA states incorrectly that the verdict was $120 million. (Pet. 5) ACLA appears to count the compensatory damages multiple times. The majority of the verdict was punitive damages under FACE, assessed separately as to each of the fourteen defendants and which are the subject of the Ninth Circuit's remand. (*See* Resp. App. 75a-91a)

[8] The District Court issued its injunction under FACE, which specifically authorizes private parties to obtain injunctive relief. 18 U.S.C. § 248(c)(1)(B). No RICO injunction was sought in this case.

(Pet. App. 13a, 135a-137a, 179a; Resp. App. 65a) The District Judge expressly found not credible petitioners' claims that the posters and the Nuremberg Files were merely a form of political protest. (Pet. App. 179a; Resp. App. 65a) The jury's finding of intention to intimidate under FACE and its decision to award punitive damages reflects a similar credibility determination. (Resp. App. 77a-90a; Pet. App. 8a, 27a, 34a)

ACLA appealed. In an opinion by Judge Kozinski, a three-judge panel reversed, ruling that ACLA must threaten that it or its agents personally will commit the threatened violence.[9] The Ninth Circuit reheard the case *en banc*. In an opinion authored by Judge Rymer, joined by Chief Judge Schroeder and Judges Hawkins, Silverman, Wardlaw and Rawlinson, the *en banc* majority found that petitioners, with intention to intimidate, threatened violence, and affirmed the liability verdict and injunction, and remanded to the District Court for further proceedings on the amount of the punitive damages award.[10]

In her opinion for the *en banc* majority, Judge Rymer carefully surveyed the uniform body of threats law developed in the Ninth Circuit and the other Circuits following this Court's decision in *Watts* v. *United States*, 394 U.S. 705 (1969), and determined that the District Court properly defined "threat" for purposes of this case. (Pet. App. 22a-31a) The court held that, under well-settled law, the jury properly considered context in determining whether petitioners' statements were "true threats."

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[9] *See* note 33, *infra*.

[10] Those proceedings have not occurred and, thus, there is no final judgment in this case. *See Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948) (holding that a judgment is not final "where liability has been determined and all that needs to be adjudicated is the amount of damages"). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *See also Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R. Co*, 389 U.S 327, 328 (1967).

(Pet. App. 30a-33a) The court further found that the FACE instructions required the jury to find that petitioners issued their threats with an intent to intimidate respondents — that is, that they subjectively intended to cause respondents to fear bodily injury. (Pet. App. 8a, 27a, 33a-34a)

Judge Rymer's majority opinion carefully explored the law governing the proper standard of review in cases implicating the First Amendment to determine what standard should apply in this case. (Pet. App. 13a-20a) As ACLA had urged, the court resolved to review the record independently to satisfy itself that the core constitutional fact — whether a true threat was made — had been established. The court then searched the factual record (*e.g.*, Pet. App. 9a-13a, 31a-33a, 39a-41a), deferring to the factfinder on issues of credibility, as this Court's precedents require. Convinced independently that ACLA's statements were unlawful true threats (and that no other trial errors had occurred), the Court of Appeals affirmed the liability verdict and the injunction.[11]

Although disagreeing with the result, the dissenting Judges — Judges Reinhardt, Kozinski, O'Scannlain, Kleinfeld and Berzon — agreed that the majority properly defined the standard for true threats, properly approved the jury's consideration of context, and properly held that the case required an independent review of the factual record. (Pet. App. 53a-55a, 69a n.1) The dissenting opinions simply disagreed with the application of those settled legal standards to the particular facts of this case. (*E.g.*, Pet. App. 53a)[12]

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[11] Petitioners do not seek review of any of the rulings on evidentiary or trial matters. In a footnote (Pet. 26 n.11), ACLA quibbles about the FACE conspiracy claim, but that argument indisputably was waived, as the decision below noted. (Pet. App. 50a n.16)

[12] In addition to joining Judge Kozinski's dissent, which agreed with the majority's articulation of threats law and standard of review, Judges Reinhardt and Berzon authored separate dissents. Judge Reinhardt

Petitioners' request for rehearing was denied, with only Judges Kozinski and O'Scannlain voting for rehearing. (Pet. App. 220a)

REASONS FOR DENYING THE PETITION

There is no reason to grant — and every reason to deny — ACLA's petition.

ACLA's petition takes issue only with the factbound application of settled law, which is not a proper basis for review by this Court. It is settled that "true threats" are not protected by the First Amendment. And all Circuits apply — as did the Ninth Circuit here — an objective, reasonable person test to determine whether a true threat exists. All Circuits also agree that context must be considered in determining whether a statement is an unlawful true threat, as the Ninth Circuit considered here. And there also is no dispute that in conducting an independent review of the factual record — as the Ninth Circuit conducted here — an appellate court affords additional protection to First Amendment rights.

Indeed, both the majority and dissenting Ninth Circuit Judges *agreed* on the applicable legal standards. The only issue posed by the petition is how settled law should be applied to the particular facts of this case. This is not a basis for Supreme Court review. *See* Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *C.J.D. Rudolph* v. *United States*, 370 U.S. 269, 270 (1962) (dismissing writ where question turned on review of factual findings).

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argued that "political speech" deserves "heightened scrutiny." *See* note 20, *infra*. Judge Berzon advocated a subjective intent standard. *See* note 21, *infra*.

The petition itself struggles to identify a certworthy issue. It lists seven similar Questions Presented for Review ("QP"), each of which is intricately factbound. Each does no more than express the same disagreement with the Ninth Circuit's application of settled law to the facts of this case. Review should be denied.

I. PETITIONERS' "FORMAT" ARGUMENT PRESENTS NO LEGAL ISSUE FOR SUPREME COURT REVIEW

A. The Court of Appeals Properly Applied the Settled Legal Standard for True Threats of Violence

ACLA devotes the majority of its petition (and four Questions Presented) to a complaint that the Court of Appeals created a "novel" theory of threats law that premises liability on the "format" of speech rather than its content. Not so. The Ninth Circuit applied settled threats law — as to which there is no conflict of authority — and properly evaluated petitioners' posters in the course of its independent review of the factual record. This is not a legal issue, much less a novel one.

It is settled that "true threats" of violence are outside the bounds of protected speech. *Watts*, 394 U.S. at 707; *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 773 (1994). Similar to the many other federal threats statutes, under FACE, "[w]hoever by force of threat of force . . . , intentionally injures, intimidates . . . any person because that person is or has been, or in order to intimidate such person . . . from, obtaining or providing reproductive health services," may be subject to civil and criminal penalties. 18 U.S.C. § 248(a)(1). There can be no dispute — and ACLA raises none — that FACE, like the many other threats statutes, is facially constitutional, as it proscribes threats of violence and explicitly disclaims any proscription of

First Amendment activity. 18 U.S.C. §§ 248(a), 248(d)(1). (*See* Pet. App. 50a n.15; Resp. App. 29a-41a)[13]

To determine whether statements constitute a true threat and not protected speech, the Ninth Circuit — and every other Circuit — repeatedly and consistently has applied an objective, reasonable person test. (*See, e.g.*, Pet. App. 25a-27a (canvassing Ninth Circuit threats cases), Pet. App. 46a-47a n.7 (citing cases from each Circuit applying objective standard to determine whether a statement is a true threat)) ACLA's petition virtually ignores this uniform body of law.[14]

Consistent with this precedent, in this case, the Ninth Circuit defined a true threat as "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to

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[13] *Accord* 18 U.S.C. § 115 (prohibiting threats to assault, kidnap or murder a federal judge or federal official); 18 U.S.C. § 175(a) (prohibiting threats to develop, acquire or possess biological weapons); 18 U.S.C. § 245(b) (prohibiting threats of force to intimidate one from exercising federal rights); 18 U.S.C. § 871 (prohibiting threats of violence against President or Vice President); 18 U.S.C. § 875(c) (prohibiting interstate transmission of threat to injure another); 18 U.S.C. § 1993(a)(8) (prohibiting threats to commit terrorist acts or other acts of violence against mass transportation systems); 18 U.S.C. § 2332a (prohibiting threats to use weapons of mass destruction); 42 U.S.C. § 3631 (prohibiting threats made to intimidate a person from exercising right to fair housing because of race). (*See also* Pet. App. 205a-206a for District Court's analysis comparing FACE with 42 U.S.C. § 3631.)

[14] The consistency of the law was most recently articulated by the Eighth Circuit, *en banc*, in *Doe* v. *Pulaski County Special School District*, 306 F.3d 616, 622 (8th Cir. 2002). The only difference among the Circuits is that some apply a "reasonable listener" test, while the majority, including the Ninth Circuit, apply a more speech-protective "reasonable speaker" test. *See id.* In this case, the more speech-protective test was applied, and petitioners in no way suggest that anything turns on the different wording. (Pet. App. 47a-48a n.7)

inflict bodily harm upon that person." (Pet. App. 28a)[15] After reviewing the record independently, the majority correctly determined, as had the jury and District Court Judge, that a reasonable speaker in ACLA's position would reasonably foresee — indeed, could only believe — that respondents would perceive ACLA's statements as a serious expression of an intent to do them bodily harm. Thus, ACLA's statements constituted unprotected threats of violence, and not protected speech. (Pet. App. 19a-20a, 40a-41a)

With no conflict in the law, ACLA appears to be disputing the common-sense notion that in evaluating whether something is an unprotected "true threat," courts should consider its context. That, presumably, is why ACLA disputes the Court of Appeals' consideration of the broader backdrop to petitioners' statements, which included murders of abortion providers following their being targeted in a wanted poster "format" — as well as abundant other evidence of the facts and circumstances surrounding ACLA's statements. (*See* Pet. App. 9a-13a (summarizing facts and referencing District Court's injunction (Pet. App. 132a-184a) for full discussion of facts)) As both the Ninth Circuit majority and dissenters agreed, however, the law is settled that context must be considered as part of the threats analysis. (Pet. App. 30a, 53a, 69a n.1)

Indeed, this Court itself already has held that, in a threats case, context can be decisive. In *Watts*, during a rally at the Washington Monument, the defendant stated:

> I have already received draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.

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[15] Judge Kozinski noted that the majority "correctly distill[ed]" this standard "[a]fter meticulously canvassing the caselaw." (Pet. App. 53a)

394 U.S. at 706. In reversing the conviction, this Court found the context of Watts' remarks determinative: it concluded that the facially threatening statement was actually a joke because the young crowd, a discussion group during a rally at the Washington Monument, laughed in response, and the statement was expressly conditional upon the occurrence of an event — induction into the armed forces — that the defendant guaranteed would never happen. *Id.* at 707-08.[16]

Since *Watts*, *all* Circuits have held that context must be examined to determine whether speech is protected or is an unlawful true threat. *See, e.g.*, *Doe* v. *Pulaski*, 306 F.3d at 626-27 (considering nationwide context of school violence and finding a threat); *United States* v. *Hart*, 212 F.3d 1067, 1072-73 (8th Cir. 2000) (considering Oklahoma City bombing as context supporting conviction of anti-abortion activist who used Ryder truck to intimidate); *United States* v. *Khorrami*, 895 F.2d 1186, 1188 (7th Cir. 1990) (considering context of worldwide anti-Semitic violence in finding "wanted" posters mailed to Jewish National Fund were true threats). *See also Schenck* v. *Pro-Choice Network of Western New York*, 519 U.S. 357, 395 (1997) ("Words take on meaning from context.") (Breyer, J., concurring and dissenting in part).

Nonetheless, as they did below, petitioners assert that their statements cannot be deemed true threats because they did not contain an "overt" threat. (Pet. 7-8, 12) But threats law does not require such literal specificity. Without context, clever threateners can with impunity utilize subtle methods of intimidation to make their targets fear violence. A threat that does not say, in so many words, "I'm going to kill you," can be very much a threat. Certainly, symbols can become true threats if targets who failed to heed the warning were killed. *See, e.g.*, *Garrovillas* v. *INS*, 156 F.3d 1010 (9th Cir. 1998) ("The letter

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[16] ACLA's posters were not conditional and they certainly were not met with laughter. (Pet. App. 11a-13a, 40a-41a)

contained a black ribbon, which Garrovillas understood to be the NPA's symbol for a death threat."). As the *en banc* majority wrote, "without context, a burning cross or a dead rat mean nothing." (Pet. App. 31a) The dissenters agreed. (Pet. App. 54a, 69a n.1, 85a) Thus, ACLA's mantra — that its posters contained no expressly "threatening language" — fails to come to grips with the settled law of threats.[17]

In short, ACLA's contention that the Ninth Circuit's consideration of the known poster/murder pattern as part of the context caused them to be held liable improperly for the "format" of their posters rather than their threatening message is merely an effort to evade the uncontroversial, settled legal principles that defeat petitioners' claims. It also is an effort to avoid the multitude of contextual facts that convinced a jury and District Court Judge that petitioners threatened to kill respondents. There is no basis for this Court to review that settled law or these particular facts.[18]

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[17] As the *en banc* majority noted, petitioners were well aware of their posters' message. Petitioner Bray gloated that a doctor who quit performing abortions after being targeted by petitioner Crane on a "wanted" poster was "bothered and afraid." (Pet. App 12a, 150a) Writing about the murder of Dr. Gunn and the "wanted" posters being made of his replacement, petitioners boasted that "many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." (Pet. App. 12, 147a) Speaking of the Deadly Dozen list, Petitioner Burnett testified, "I mean if I was an abortionist, I would be afraid." (Pet. App. 12a, 154a) Crane himself kept a "wanted" poster bearing his name in a file he labeled "death threats." (Pet. App. 157a)

[18] Contrary to the suggestion in ACLA's petition (Pet. 11), Physicians did not raise the poster/murder pattern for the first time on appeal. Indeed, as the District Court's decision on petitioners' motions to dismiss shows, the context into which ACLA released its threats has always included the fact that three abortion providers were murdered after being targeted on "wanted" posters. (Resp. App. 3a-6a) Although petitioners now attempt to distinguish their posters, petitioner David Crane, ACLA's National Director, admitted under oath that "wanted" and "guilty" posters had the same impact. (Pet. App. 10a, 157a)

B. Threats of Violence Are Not Protected Even if Uttered in a "Political" Context

Threats of violence are not protected, and the speaker's political agenda does not change this settled principle. (Pet. App. 41a-42a, 48a) Most threats against government leaders are "political." Further, whether a threat is distributed publicly or privately is part of the contextual analysis, but does not change the test for true threats.[19] The objective standard controls the threats determination irrespective of the speaker's particular political views or method of communication. *See, e.g., Madsen*, 512 U.S. at 773 (stating, in a case involving abortion protesters, that "threats . . . however communicated, are proscribable under the First Amendment"); *United States* v. *Viefhaus*, 168 F.3d 392, 395-96 (10th Cir. 1999) (assessing statements on white supremacist hotline under objective standard and affirming threats conviction); *United States* v. *Gilbert*, 884 F.2d 454, 457-58 (9th Cir. 1989) (applying objective test in finding statements opposing interracial adoption were threats).

In *all* political movements, those *who threaten violence* lose constitutional protection. Here, ACLA made its threats in the context of an atmosphere of brutal violence against abortion providers. "[U]tterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution." *Milk Wagon Drivers* v.

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[19] That ACLA did not send its threats in the mail to respondents does not render them protected speech. (Pet. 15) As the decision below noted, ACLA's threats were "publicly distributed but personally targeted." (Pet. App. 41a) They were true threats. *Cf. Hess* v. *Indiana*, 414 U.S. 105, 108-09 (1973) (reversing disorderly conduct conviction where statements were "not directed to any person or group of persons").

Meadowmoor Dairies, 312 U.S. 287, 293 (1941) (affirming labor injunction); *accord Madsen*, 512 U.S. at 774.[20]

II. THE COURT OF APPEALS PROPERLY REAFFIRMED THE SETTLED OBJECTIVE STANDARD — AND CORRECTLY FOUND BOTH OBJECTIVE AND SUBJECTIVE INTENT

Despite settled law, ACLA asks this Court to grant review in order to change the law of all Circuits to require subjective intent for "true threats" — a standard that was, in any event, met in this case.[21] ACLA bases this request on Justice Marshall's concurrence in *Rogers* v. *United States*, 422 U.S. 35 (1975). In *Rogers*, this Court reversed the defendant's conviction for threatening the life of the President in violation of 18 U.S.C. § 871, finding prejudicial error in the trial court's communications with the jury. In concurring, Justice Marshall stated that he would require "proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out." *Rogers*, 422 U.S. at 48. This Court has never adopted that view.[22]

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[20] Judge Reinhardt argued that "political speech" deserves "heightened scrutiny." (Pet. App. 52a) As explained *infra*, ACLA's speech was accorded heightened scrutiny — and still found to be threatening.

[21] ACLA's petition makes clear that its proposed subjective intent requirement would derive not from any statute but rather from the First Amendment. (Pet. 21-22) Judge Berzon's dissent takes the same view. (Pet. App. 83a-86a) Thus, adoption of a subjective intent standard in this case necessarily would make subjective intent the constitutional intent requirement for all threats statutes, including those that proscribe threats against the President and contained in anti-terrorism laws. *See* note 13, *supra*. Defendants in all of these contexts would contend that they merely are engaging in protected political speech.

[22] All Circuits – and both the majority and dissenters below – agree that the speaker's intention to carry out the threat is *not* required. (Pet. App. 26a-27a, 29a, 69a n.1, 105a n.8)

Indeed, not a *single* Court of Appeals to consider Justice Marshall's subjective test has elected to embrace it. *See United States* v. *Aman*, 31 F.3d 550, 556 (7th Cir. 1994) (reaffirming objective standard and stating: "Although we owe the view of a single Justice great respect, we cannot treat it as stating the governing law. . . [T]he weight of authority is to the contrary."); *United States* v. *Johnson*, 14 F.3d 766, 769-71 (2d Cir. 1994) (rejecting subjective threats standard); *United States* v. *Kosma*, 951 F.2d 549, 556-57 (3d Cir. 1991) (same); *United States* v. *Manning*, 923 F.2d 83, 85 (8th Cir. 1991) (same and noting that "the trend towards an objective standard has persisted"); *United States* v. *Welch*, 745 F.2d 614, 618-19 (10th Cir. 1984) (same). (*See also* Pet. App. 48a n.10 (citing cases rejecting subjective intent standard))

And a subjective standard makes no sense. Statutes that proscribe threats are meant to prevent the harms and disruptions associated with the threat itself. The settled objective test employed by all Circuits recognizes this by prohibiting those statements that a reasonable speaker would foresee as threatening. (Pet. App. 26a-28a) A different test would only grant license to clever threateners who will then later claim that they did not subjectively intend to threaten — thereby increasing the prosecutor's burden of proof. Moreover, as the *en banc* majority explained, factors such as the speaker's subjective intent or ability (or inability) to do the harm are already part of the threats analysis and "go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm." (Pet. App. 28a) Further, in this case, respondents proved that the context evidence was "within the knowledge of the defendants." (Pet. App. 252a) This is not a "negligence" test, as ACLA suggests. (Pet. 21-22)

ACLA's argument regarding the standard of intent is further unavailing as a basis for certiorari *in this case* because — as the Ninth Circuit majority explained — both the jury *and* the District Court found specific intent. (Pet. App. 8a,

13a) As Judge Rymer's opinion points out, in addition to the finding of a true threat under the objective standard, the jury instructions in this case for the statutory elements of FACE — which ACLA ignores entirely — required intent to intimidate and thus satisfied any specific intent standard.[23] (*See* Pet. App. 27a, 41a; *see also id.* at 34a (approving FACE jury instruction)) Under FACE, "'intimidate' means to place a person in reasonable apprehension of bodily harm to him- or herself or to another." 18 U.S.C. § 248(e)(3). The *en banc* majority, reviewing the record independently, agreed with the jury's finding of "a true threat to intimidate." (Pet. App. 45a) This Court should not review an issue that would have no impact on this case. *See Rogers* v. *United States*, 522 U.S. 252, 259 (1998) (dismissing writ as improvidently granted where "the record does not fairly present the question").

That the injunction includes a specific intent requirement for restrained future conduct does not signify a departure from the objective standard for defining "true threats," as ACLA contends. The injunction enjoins petitioners only from the same activity that was found unlawful, evidencing the District Judge's careful efforts to narrowly tailor the injunction to prohibit no more speech than necessary. As the *en banc* majority held, "[t]he terms of the injunction are finely tuned and exceedingly narrow. Only threats or use of the posters or their equivalent with the specific intent to threaten Crist, Hern, either Newhall, PPCW or PFWHC are prohibited. Only personal information about these particular persons may not be used in the Nuremberg Files with the specific intent to threaten them.

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[23] This was the position of the American Civil Liberties Union, as *amicus curiae*, which urged the Ninth Circuit to affirm on the ground that specific intent had been found. (Pet. App. 27a, 46a n.6) The ACLU, in proposing a subjective intent test, further recognized that adoption of such a test would be a change in settled law. (Pet. App. 199a-200a) In asserting that "intent to intimidate is not the same as intent to threaten force" (Pet. 23 n.10), ACLA ignores FACE's definition of "intimidate," on which the jury was instructed. (Pet. App. 27a, 34a, 254a)

This leaves huge room for ACLA to express its views." (Pet. App. 44a) The District Court's abundance of caution clearly satisfies this Court's precedents reconciling important protections afforded by injunctions with the expressive rights of the enjoined party. *See Madsen*, 512 U.S. at 765.[24]

III. THE DECISION BELOW DOES NOT CONFLICT WITH THE SECOND CIRCUIT'S DECISION IN *UNITED STATES* V. *KELNER*

Petitioners contend that the Ninth Circuit's decision conflicts with the Second Circuit's decision in *United States* v. *Kelner*, 534 F.2d 1020 (2d Cir. 1976). (Pet. 24; Pet. QP 5) There is no conflict. (Pet. App. 30a)

In *Kelner*, a Jewish Defense League activist stated on television that his organization was "planning to assassinate Arafat." Like the Ninth Circuit did in this case, the Second Circuit applied an *objective* standard taking into account context. Petitioners cite an excerpt from the following:

> So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied.

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[24] Although mentioned in its seventh Question Presented, ACLA does not seek review of the scope of the injunction. Under this Court's precedents, the injunction clearly is not an unlawful prior restraint, as it followed a finding of past illegal conduct. *Madsen*, 512 U.S. at 764 n.2 (no prior restraint where injunction issued because of prior unlawful conduct); *Schenck*, 519 U.S. at 374 n.6 (rejecting argument that all injunctions are improper prior restraints where injunction prohibited conduct previously adjudicated and found unlawful).

534 F.2d at 1027. This statement emerged from the *Kelner* court's discussion of the need for that defendant's facially threatening language to be a true threat *in its context*. *See Watts*, 394 U.S. at 706-08. Based on the context surrounding Kelner's statements, the Second Circuit *affirmed* the threats conviction.

The Second Circuit's standard does not differ from that of the Ninth Circuit or any other Circuit. (Pet. App. 30a, 198a-199a) In the quarter of a century since *Kelner*, the Second Circuit — like all other Circuits — has developed an objective standard that takes context into account. *See United States* v. *Sovie*, 122 F.3d 122, 125 (2d Cir. 1997) ("[t]he test is an objective one — namely, whether an ordinary, reasonable recipient who is familiar with the context of the [statement] would interpret it as a threat of injury") (quoting *United States* v. *Malik*, 16 F.3d 45, 50 (2d Cir. 1994)). The Second Circuit fully recognizes the importance of context in veiled threats cases. *Malik*, 16 F.3d at 50. And, the Second Circuit routinely cites *Kelner* in *approving* threats charges and *affirming* convictions. *See, e.g, id.*; *United States* v. *Francis*, 164 F.3d 120, 123 (2d Cir. 1999); *Sovie*, 122 F.3d at 125.[25]

The objective test enunciated and applied by the Ninth Circuit in this case is fully consistent with the threats jurisprudence of all other Circuits. *See generally Doe* v. *Pulaski*, 306 F.3d at 622 (noting that "[a]ll the courts to have reached the issue [of threats] have consistently adopted an

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[25] *Spitzer* v. *Operation Rescue*, 273 F.3d 184 (2d Cir. 2001), also does not spell a conflict of authority. (*See* Pet. 24) In largely affirming the district court's preliminary injunction against an anti-abortion activist, the *Operation Rescue* court expressed concern, in *dicta*, that the *evidence* before the district court might not have satisfied the threats standard. *Id.* at 196. ACLA's petition does not articulate why *Operation Rescue* presents any conflict with the decision below. It does not. *Operation Rescue* demonstrates only that a threats finding requires examination of all the facts and circumstances surrounding a particular statement, as the Ninth Circuit majority did here.

objective test . . . "). To the extent the Second Circuit were to hold (which it has not done) that its test differs from that of all the other Circuits, any such conflict should be addressed in reviewing a case decided by the Second Circuit. *See Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923) (dismissing writ as improvidently granted where circuits "were really in harmony and not in conflict").

IV. THE DECISION BELOW DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT

Petitioners also struggle to conjure a conflict between the Ninth Circuit's decision and decisions of this Court. There is none.

A. The Decision Below Is Not "Unconstitutionally Vague"

ACLA posits that the decision below suffers from "unconstitutional vagueness," contending that the *en banc* majority's application of the settled threats standard to the facts of this case is "a standardless speech restriction." (Pet. 14-15) This confused argument does not merit review either.

The vagueness doctrine prohibits the government from enacting laws under which persons "'of common intelligence must necessarily guess at its meaning.'" *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971) (striking down ordinance prohibiting persons from assembling and conducting "themselves in a manner annoying to persons passing by" as specifying "no standard of conduct" at all) (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)).

The petition, however, does not raise a vagueness challenge to any statute — and indeed petitioners state that this case is *not* about statutory construction. (Pet. 13) In particular, petitioners do not attack the facial constitutionality of FACE, which contains language almost identical to the many other

federal threats statutes. *See* note 13, *supra*.[26] Instead, ACLA's "vagueness" challenge appears to be to the Ninth Circuit's decision itself. This "vagueness" challenge does not provide a legal issue for this Court to review either.

The Court of Appeals determined that in context — context that was within petitioners' *and* respondents' knowledge (Pet. App. 12a-13a) — ACLA's wanted posters and the list of Physicians in the Nuremberg Files constituted true threats of violence. This finding is not "vague" — it simply is not the outcome petitioners desired. Once again, ACLA's position — now swathed in the cloak of "vagueness" — is that its view of the facts should prevail instead of the view taken by the jury, the District Court and the *en banc* majority. There is no basis for review here. *Johnston*, 268 U.S. at 227 ("We do not grant a certiorari to review evidence and discuss specific facts.").[27]

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[26] *See, e.g., Norton* v. *Ashcroft*, 298 F.3d 547 (6th Cir. 2002) (holding that FACE is constitutional and collecting cases). The District Court rejected ACLA's facial challenges to FACE (Resp. App. 29a-41a), and petitioners did not appeal on that issue (*see* Pet. App. 50a n.15, 51a n.17.).

[27] ACLA asserts that the Ninth Circuit's singular use of the phrase "in conjunction with" constitutes the adoption of a new theory of law, which of course it does not. (Pet. 9, 14, 25; Pet. App. 45a) As explained by the *en banc* majority and throughout this brief, the jury was properly instructed under settled threats law, and the *en banc* majority, in reviewing the record independently, explained why the Nuremberg Files, which were unveiled after petitioners' Deadly Dozen List and Crist Poster, properly were found to be a true threat "in conjunction with" those prior facts. This factual analysis was entirely appropriate — and correct. There simply is no basis for a new trial with new jury instructions, as ACLA also suggests in a last-ditch effort to retry this case. (Pet. 26; Pet. QP 4) As the court below held, there was no error in the jury instructions, which included several requested by petitioners on the First Amendment. (Resp. App. 73a-74a; Pet. App. 34a-35a)

B. There Is No Conflict With *Brandenburg* v. *Ohio*

ACLA contends that the Ninth Circuit has "implicitly reject[ed]" *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). (Pet. 16) It clearly has not. (Pet. App. 21a-22a)

In *Brandenburg*, decided in the same term as *Watts*, this Court held that Ku Klux Klan members were engaging in protected advocacy when they made racial epithets at a rally. (Pet. App. 21a) Relying on that case, petitioners argue that only speech "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action" is actionable. (Pet. at 16) Petitioners ignore the distinction between threats and incitement. *See United States* v. *Dinwiddie,* 76 S.3d 913, 922 n.5 (8th Cir. 1996). (*See also* Pet. App. 80a-81a (Judge Berzon's discussion of distinction between threats and incitement); Resp. App. 24a n.13))

ACLA was not held liable for inciting acts by others — it was held liable for its true threats of violence. *Brandenburg* governs incitement. *Watts* and its progeny govern threats. FACE is a threats statute governed by *Watts* and its progeny. Indeed, recognizing this very distinction, ACLA urged the District Court to instruct the jury on the difference between threats and incitement, and received the precise instruction it requested. (Resp. App. 73a-74a; Pet. App. 82a, 105a n.7)

ACLA's contention that its statements incited no violence is thus wholly beside the point. "True threats" are proscribable if — as here — they are directed at specific targets whom the speaker should foresee would take the statements as a serious expression of an intent to do bodily harm. (Pet. App. 25a–26a) True threats are proscribed to protect "individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388

(1992).[28] Here, Physicians contended —and proved — that ACLA threatened them with violence, not that third parties were incited to commit that violence. (Resp. App. 73a-74a) Indeed, if a threatener's words provoke enough fear, physical violence — by anyone — to carry out the threat is unnecessary, as the threatener's terrorist purpose is accomplished. *See, e.g., United States* v. *Velasquez*, 772 F.2d 1348, 1357 (7th Cir. 1985).[29]

C. There Is No Conflict With *NAACP* v. *Claiborne Hardware*

ACLA contends that the decision below conflicts with *NAACP* v. *Claiborne Hardware*, 458 U.S. 886 (1982). The Ninth Circuit majority fully analyzed the facts of that case against the very different facts of this case. (Pet. App. 23a-25a) Petitioners' disagreement with the result of that factual analysis presents no question for review.

In *Claiborne Hardware*, white business owners — not purporting to be the subjects of any threats — sued the NAACP and NAACP official Charles Evers for damages resulting from an extended boycott of white-owned businesses in the late 1960s. 458 U.S. at 889-80. The Mississippi state courts awarded damages under tort and antitrust theories for "lost business earnings and lost goodwill during a 7-year period." *Id.* at 893. This Court reversed.

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[28] This case does not present the issues to be considered by this Court in *Virginia* v. *Black*, No. 01-1107. ACLA does not raise a content or viewpoint neutrality challenge, which is the focus of *Black*.

[29] ACLA appears to argue that this Court should adopt a standard for threats that requires *Brandenburg*-like imminence *plus* specific intent. (Pet. 25) This novel standard has never been adopted by *any* court. Indeed, even Judge Berzon's dissent, which urges a significant departure from established law and the adoption of a subjective intent requirement, does not go that far. (Pet. App. 80a)

The *Claiborne* Court made clear that those who "engaged in violence or threats of violence . . . may be held responsible for the injuries that they caused." 458 U.S. at 926. But, because "all of [the merchants'] losses were not proximately caused by violence or threats of violence," the *undifferentiated* verdict in *Claiborne* — which included damages caused by lawful boycotting and warnings of "vilification or social ostracism" — could not stand. *Id.* at 922. As Judge Rymer's majority opinion pointed out, the "break your neck" comments in *Claiborne* were

> hyperbolic vernacular. Certainly there was no history that Evers or anyone else associated with the NAACP had broken anyone's neck who did not participate in, or opposed, this boycott or any others. Nor is there any indication that Evers's listeners took his statement that boycott breakers' "necks would be broken" as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores.

(Pet. App. 25a)[30]

Thus, the *Claiborne* Court concluded that there was no evidence that Evers' extemporaneous rhetoric authorized or directly threatened violence. If there had been, "the references

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[30] During the *Claiborne* boycott, black boycott violators were noted by "store watchers" and their names were read at NAACP meetings and published in a local paper, "Black Times." 458 U.S. at 903-04. This Court (and the Mississippi courts) viewed these as *demeaning acts of social ostracism*, not as threats of violence. *Id.* at 903-04. Although several "isolated acts of violence" had occurred, *id.* at 922, which included damage to a flower garden, a brick thrown through a windshield and birdshot and pellets fired at the houses of two violators, notably in *Claiborne* — unlike here — no murders of boycott violators had occurred and the targets of Evers' speeches did not wear bulletproof vests or file the lawsuit — they continued shopping at the white merchants' stores. *Id.* at 904.

to discipline in the speeches could be used to corroborate that evidence." 458 U.S. at 929. By contrast here, as the *en banc* majority explained,

> no one putting Crist, Hern, and the Newhalls on a "wanted"-type poster, or participating in selecting these particular abortion providers for such a poster or publishing it, could possibly believe anything other than that each would be seriously worried about being next in line to be shot and killed. And they were seriously worried.

(Pet. App. 41a)

Indeed, unlike the targets of Evers' speech — the boycott-breakers who were *not* the plaintiffs in *Claiborne* — respondent Physicians testified about their personal fear following ACLA's threats (and fear of ACLA in particular) and described the extensive security measures they undertook as a direct result of that fear. (Pet. App. 12a-13a, 40a-41a) The prior posters and murders and petitioners' knowing and repeated endorsement of that violence provided further context for the finding of intent to threaten violence that the *Claiborne* facts lacked. (Pet. App. 9a-10a, 12a, 140a-143a, 195a)[31] *Claiborne* did not even involve a true threats analysis under a threats statute. (Pet. App. 24a-25a) There simply is no conflict here

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[31] ACLA incorrectly (and brazenly) states that "ACLA said *nothing* about violence." (Pet. 17) (emphasis in original) Indeed, ACLA was formed precisely because its leaders endorsed violence and called for the acquittal of murderers of abortion providers. As the record also shows, petitioners spoke repeatedly in support of "justifiable homicide" of abortion providers. All of petitioners' "political" statements had violent overtones. (*E.g.*, Pet. App. 9a-12a, 140a-144a)

with the law enunciated in *Claiborne* — the facts and legal bases of the decisions are simply different.[32]

D. There Is No Conflict With *Ashcroft* v. *Free Speech Coalition*

This case does not present any common issue — much less a conflict — with *Ashcroft* v. *Free Speech Coalition*, 122 S. Ct. 1389 (2002), decided a month before the decision below and thus fully considered by the Court of Appeals.

In *Free Speech Coalition*, this Court struck down a statute that prohibited simulated child pornography, holding that the connection between the speech at issue there and the harm it may cause was too "contingent and indirect" to justify suppression. 122 S. Ct. at 1401-03. That is not what this case is about. ACLA's posters were found to be threats to kill because ACLA knew that the posters would be perceived as a serious expression of an intent to do bodily harm to Physicians. (Pet. App. 12a) Like the many other federal threats statutes, FACE aims to prevent intimidation by threats of violence. Threats were not at issue in *Free Speech Coalition*.

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[32] Petitioners also assert that the decision below contravenes *Claiborne* by imposing "guilt by association" for posters made by persons who were not ACLA members. (Pet. 19-20) No such liability was imposed in this case. Petitioners were *not* held liable for actions other than their own. ACLA put its name on the three threats at issue, making it directly liable, and all other petitioners were held liable for their personal involvement in making those threats. (Pet. App. 34a-35a) The jury was *expressly* instructed that it could not impose liability on petitioners for the actions of others, mere association, or simply because petitioners' speech was coercive. The jury also was *expressly* instructed that the *only* alleged threats were the Deadly Dozen List, Crist Poster and Nuremberg Files. (Pet. App. 34a-35a, 252a, 256a; Resp. App. 73a-74a) The verdict in this case was not undifferentiated, as in *Claiborne*.

E. The Court of Appeals Properly Conducted an Independent Review of the Factual Record and Correctly Affirmed the Findings of the Jury and District Court

Finally, ACLA claims that the Court of Appeals devised "a novel, deferential standard of First Amendment review" that conflicts with the decisions of this Court and of other Circuits. (Pet. 26-27; Pet. QP 6) Once again, ACLA is trying to manufacture conflict where none exists — this time by distorting the words of the decision below.

As is clear from its opinion, the Ninth Circuit majority "review[ed] the evidence on true threats independently" (Pet. App. 39a), adhering to the standard of appellate review on First Amendment issues set out in this Court's decisions in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989), and *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). Even the dissenting Ninth Circuit judges agreed that the majority articulated the appropriate standard of independent review. (Pet. App. 54a; *see also id.* 108a n.15) Petitioners (like the dissenting judges below) simply disagree with the *result* of that independent review. This disagreement over the evidence does not warrant certiorari review. *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 n.8 (1981) ("we are presented primarily with a question of fact, which does not merit Court review.").[33]

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[33] Judge Kozinski acknowledged that the majority "cite[d] evidence supporting the finding that the two wanted posters prepared by defendants constituted a true threat." (Pet. App. 55a) The dissenters simply disagreed with the majority's interpretation of that evidence. (Pet. App. 53a-54a) Judge Kozinski contended that it was not clear from the facts of this case that ACLA or its agents would personally commit the threatened harm. (Pet. App. 56a) As the *en banc* majority's decision

The *en banc* majority carefully articulated and correctly applied the independent review standard enunciated in this Court's precedents, and appropriately deferred on credibility issues.[34] In *Harte-Hanks*, this Court emphasized that, even under the independent review standard, "credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses.'" 491 U.S. at 688 (quoting *Bose*, 466 U.S. at 499-500).[35] *See also Hurley*, 515 U.S. at 567 (1995) (although independent review requires appellate courts to "decide for [them]selves whether a given course of conduct falls on the near or far side of the line of

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and the record show, however, the evidence, in fact, was substantial on this issue. ACLA issued its posters with knowledge of the preceding posters and murders, and Physicians "could well believe that *ACLA* would make good on the threat." (Pet. App. 40a) (emphasis added) The verdict form showed the jury's finding that each of the three statements "is a true threat *by one or more of the defendants to bodily harm, assault or kill* one or more of the plaintiffs." (Pet. App. 249a; Resp. App. 75a) (emphasis added) Physicians testified that they feared *these* defendants. Dr. Hern, for example, testified that ACLA's hit lists said "do what we tell you to do, or *we will kill you*. And they do." "This is a hit list and that *these people who made this list will kill me*." "I am fearful for my life, that I am afraid that — *that someone from the group that put out this poster* would be there and would kill me." (Tr. 639, 664; Pet. App. 12a-13a, 40a) (emphases added) These were true threats of violence.

[34] In fact, Judge Kozinski's dissent chastised the majority for wasting space addressing the appropriate standard of review. (Pet. App. 53a, 69a n.1) Each of the cases ACLA cites uses the same standard that the Ninth Circuit applied in this case. (Pet. 29) *E.g.*, *Howard* v. *Antilla*, 294 F.3d 244, 249 n.8 (1st Cir. 2002) ("independent review is subject to limitations and is not equivalent to de novo review of the entire record. For instance, '[p]urely factual determinations, particularly those involving the credibility of witnesses, remain best addressed by the factfinder, and are subject to the usual, more deferential standard of review.'").

[35] In *Harte-Hanks*, this Court expressly refuted the petitioner's contention that it "reject[ed] the trial court's credibility determination in *Bose*." 491 U.S. at 689 n.35. (*See* Pet. App. 15a)

constitutional protection," it "does not limit . . . deference to a trial court on matters of witness credibility"); *Madsen*, 512 U.S. at 769-70 ("deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review.").

Petitioners' contention that the *en banc* majority applied a "substantial evidence" standard — and no more — is a misstatement of Judge Rymer's careful opinion.[36] The court *first* reviewed the jury's verdict "for substantial evidence supporting the historical facts (including credibility determinations) and the elements of statutory liability (including intent)." (Pet. App. 19a) It was only *after* the majority found *substantial* evidence to support the verdict — a standard in itself beyond rational basis review — that the court "review[ed] the record independently in order to satisfy ourselves that the posters and the Files constitute a 'true threat' such that they lack First Amendment protection." (*Id.* 20a) Then, *after* independently reviewing the record, the court itself concluded that "use of the Crist Poster, the Deadly Dozen Poster, and the individual plaintiffs' listing in the Nuremberg Files constitute a true threat." (*Id.* 44a; *see id.* 39a-42a) This meticulous review fully satisfies this Court's precedents.

At bottom, petitioners' argument reduces to a factbound disagreement over the result of the Ninth Circuit's thorough, independent review of the "true threat" finding. On the law, there is no disagreement. Certiorari review is unwarranted here.

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[36] Indeed, citing to the *en banc* decision in this case, the Ninth Circuit recently reiterated the independent review standard and distinguished that standard from a "sufficiency of the evidence" standard. *See United States* v. *Hanna*, 293 F.3d 1080, 1088 & 1088 n.9 (9th Cir. 2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: November 12, 2002

Respectfully submitted,

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APPENDIX A

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; ET AL., Plaintiffs,
v.
AMERICAN COALITION OF LIFE ACTIVISTS; ET AL., Defendants.

Sept. 18, 1996

Stephen S. Walters, Stoel Rives, Portland, OR, Maria T. Vullo, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, Roger K. Evans, Legal Action for Reproductive Rights, Planned Parenthood Federation of America, Inc., New York City, for Plaintiffs.

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OPINION AND ORDER

ROBERT E. JONES, District Judge:

Plaintiffs filed this lawsuit against Defendants,[1] alleging violations of the Freedom of Access to Clinics Act of 1994 ("FACE"), 18 U.S.C.A. § 248 (1996), the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962 (1988), Oregon RICO ("ORICO"), Oregon Revised Statutes ("ORS") 166.720 (1995), and Oregon state tort law. This action is before this Court on Defendants' Motion to Dismiss Plaintiffs' Complaint (#103, #104, #112), and Motion for Judgment on the pleadings (#114).

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[1] "Plaintiffs" include two not-for-profit corporations and several individual Plaintiffs: Planned Parenthood of the Columbia/Willamette, Inc. ("Planned Parenthood"), Portland Feminist Women's Health Center ("Portland Feminist"), Robert Crist, M.D., Warren Hern, M.D., Elizabeth Newhall, M.D., James Newhall, M.D., and Karen Sweigert, M.D.. The two corporate Plaintiffs operate clinics and provide health services including abortions. The individual Plaintiffs are all doctors who perform abortions.

"Defendants" include two Portland-based associations and several individual Defendants: the American Coalition of Life Activists ("ACLA"), Advocates for Life Ministries ("ALM"), Michael Bray, Andrew Burnett, David Crane, Timothy Dreste, Michael Dodds, Joeseph Foreman, Charles McMillan, Stephen Mears, Monica Miller, Bruce Murch, Catherine Ramey, David Stover, Donald Treshman, Charles Wysong. The two associational Defendants oppose abortions and all the individual Defendants have allegedly been involved with ACLA and other anti-abortion organizations. ALM coordinates the Northwest Region of ACLA.

When collectively referring to the individual Plaintiffs or Defendants, they shall be termed "Individual Plaintiffs" or "Individual Defendants."

FACTUAL ALLEGATIONS

Plaintiffs allege that the Individual Defendants formed the American Coalition of Life Activists ("ACLA") with the intention to use "harassment, intimidation and threats of violence in order to cause violent acts and to drive plaintiffs out of business." Compl. ¶ 38. ACLA causes violent acts primarily through publication of "wanted" or "unwanted" posters which mimic law enforcement posters seeking the arrest of criminals. *Id.* ¶ 39. Specifically, in January 1995, ACLA and the Individual Defendants released a "wanted" poster (the "Deadly Dozen List") which listed names, home addresses, and some telephone numbers of thirteen physicians, including three Plaintiffs Hern, Elizabeth Newhall, and James Newhall, who perform abortions. *Id.* ¶ 40-41, Ex. A.

The Deadly Dozen List states that the individuals listed are "Guilty of Crimes Against Humanity" and offers a "$5,000 Reward for information leading to arrest, conviction and revocation of license to practice medicine." *Id.*, Ex. A. Plaintiffs claim that the Deadly Dozen List "suggests an objective that requires the capture and punishment of the individuals named in the poster." *Id.* ¶ 41. Moreover, Plaintiffs state that the Deadly Dozen List is reasonably perceived by Plaintiffs to be a threat of force against Plaintiffs, as demonstrated by the following: (1) Defendants made threatening statements in connection with release of the Deadly Dozen List; (2) in response to release of the Deadly Dozen List, the Federal Bureau of Investigation and United States Department of Justice offered the doctors on the Deadly Dozen List protection 24 hours a day; and (3) attacks on physicians occurred after release of similar type posters. *Id.* ¶ 43. Indeed, Plaintiffs' allegations show a sustained temporal pattern in which a physician is shot to death shortly after his picture appears on a "wanted" poster (Exs. C, D, and E; as alleged *Id.* ¶¶ 53, 55; 56, 58; and 60, 68). Exhibits A and B, like Exhibit E, the distribution of which preceded the

shooting of Dr. Britton, his wife, and volunteer escort, contain the specific language "crimes against humanity." All five posters contain descriptions which specifically identify each physician.

After the Deadly Dozen List was distributed, Defendant McMillian publicly encouraged violence against abortionists on March 27, 1995:

"More violence is inevitable, and it is righteous. * * * It wouldn't bother me if every abortionist in the country today fell dead from a bullet."

Id. ¶ 45 (quoting Defendant McMillian). In addition, Defendant Bray sells bumper stickers that read, "'Execute Murderers-Abortionists.'" *Id.* (quoting Defendant Bray's Bumper Stickers). Both Defendants Crane and Ramey also sported these bumper stickers.

Furthermore, an illustration in the July 1995 issue of the *Life Advocate*[2] depicted a pot of thick liquid on which is drawn a map of four cities where abortionists have been killed. The illustration also depicted several cans, each bearing the name of an abortionist, from which the contents were being poured into the pot. Next to the illustration is a biblical quote referring to the shedding of blood. *Id.* ¶ 46. Plaintiff alleges that "[t]his picture obviously is intended to be an endorsement of the prior murders and shootings of abortion providers and to cause further violence against members of the plaintiff classes."[3] *Id.*

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[2] This magazine is published and distributed by ALM. Compl. ¶ 18. Specifically, Defendant Burnett publishes the magazine, Defendant Ramey is associate editor of the magazine, and Defendant Stover contributes to the magazine. Compl. ¶¶ 20, 29, 30.

[3] On July 9, 1996, Plaintiffs withdrew their class allegations from the Complaint; therefore, allegations which refer to the class shall be

Finally, in August 1995, during a convention in St. Louis, Missouri, "defendants, acting in furtherance of their conspiracy, unleashed a new wave of threatening posters into interstate commerce * * * that target for violence physicians who provide abortions * * *." *Id.* ¶ 47-48. One of the posters targets Plaintiff Crist by including his name, home and work addresses, and his photograph. *Id.* ¶ 48, Ex. B. In addition, during the convention, Defendants released several posters which targeted abortion clinics. *Id.* ¶ 49.

To provide context to Defendants' activities, Plaintiffs also allege several violent incidents involving abortionists and clinics:

(1) in March 1993, Dr. David Gunn was murdered after his name, physical description, address, and description of his car, appeared on an "unwanted" poster, *Id.* ¶¶ 53-55, Ex. C;

(2) in August 1993, Dr. George Patterson was murdered after release of a "wanted" poster containing a description of himself and his car, *Id.* ¶¶ 56-58, Ex. D;

(3) in May 1993, after Defendant Treshman stated that "we have been assured that [Dr. Crist] will be monitored and appropriate action will be taken," a shot gun was fired several times into the children's play-room at Plaintiff Crist's home, *Id.* ¶¶ 59-60;

(4) in August 1993, a member of ALM shot Dr. George Tiller after the *Life Advocate* published several articles about him, and Defendants Bray and Stover praised the shooting, *Id.* ¶¶ 61-62;

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stricken unless they are relevant and apply to the named Plaintiffs in this action.

(5) in July 1994, Dr. James Barrett was murdered after publication of an "unwanted" poster featuring his name, photograph, home address, work and home telephone numbers, and date of birth, *Id.* ¶ 66-68, Ex. E;

(6) in November 1994, after Defendant McMillan stated publicly, "Why would a person [assassinate] publicly, when maybe he could have done it clandestinely, with a high-powered rifle * * *," Dr. Garson Romalis was shot in the leg by a sniper with an assault rifle, *Id.* ¶ 73-74;

(7) in December 1994, after the *Life Advocate* noted that Dr. Britton's murder caused other abortionists to resign, a gunman killed two clinic workers at the Planned Parenthood and Preterm Abortion Clinics in Brookline, Massachusetts, as well as fired shots into the Hillcrest Clinic in Norfolk, Virginia, *Id.* ¶ 77-78.

Plaintiffs contend that "Defendants' unrelenting threats, including and in connection with the repeated distribution of 'unwanted'-style posters, as noted above, has [sic] aggravated the past violence and has [sic] instilled fear in all plaintiffs that more violence is yet to come if defendants are not stopped." *Id.* ¶ 80.

CAUSES OF ACTION

Based on the above allegations, Plaintiffs assert the following seven causes of action:

(1) Defendants have conspired to violate FACE, 18 U.S.C.A. § 248(a)(1), by intending to injure, threaten and intimidate Plaintiffs through the dissemination of "unwanted"-style posters which target abortion providers like Plaintiffs who are

aggrieved persons within the meaning of 18 U.S.C.A. § 248(c)(1)(a);[4]

(2) Defendants violated FACE, § 248(a)(1), by threatening, injuring, and intimidating Plaintiffs because they are providing "reproductive health services";

(3) Defendants, except ACLA, violated RICO, 18 U.S.C. § 1962(c), by participating and agreeing to

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[4] Section 248(a)(1) reads:

(a) Prohibited activities.--Whoever--

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services * * *.

Section 248(c)(1)(a) provides a right of action:

Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services * * *.

In an action under § 248(c)(1)(a), "the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses." 18 U.S.C.A. § 248(c)(1)(B).

Section 248(e)(5) defines "reproductive health services" as "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the *termination of a pregnancy*." (Emphasis added).

participate in the operation or management of ACLA's affairs through a pattern of racketeering activity that involves at least two predicate acts which include publication of the Deadly Dozen List and similar oral or written publications containing threats of force against Plaintiffs;[5]

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[5] Section 1962(c) of RICO provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Furthermore, Defendants' predicate acts include violations of 18 U.S.C. § 1951 (the "Hobbs Act") and ORS 163.275 (Oregon Coercion Statute). Section 1951(a) of the Hobbs Act reads in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce * * * by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Section 163.275(1) of the Oregon coercion statute defines the crime of coercion and reads in relevant part:

> (1) a person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in the other person a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct contrary to the compulsion or inducement, the actor or another will:
>
> (a) Unlawfully cause physical injury to some person; or
>
> (b) Unlawfully cause damage to property; or
>
> (c) Engage in conduct constituting a crime; or * * *

(4) Defendants, except ACLA, violated 18 U.S.C. § 1962(d) by conspiring to violate RICO as a result of agreeing to the commission of two or more of the predicate acts;[6]

(5) Defendants violated ORICO, ORS 166.720(3), for the same reasons evinced under Plaintiffs' federal RICO claims;[7]

(6) Defendants violated ORS 166.720(4) by conspiring to violate ORICO; [8]

(7) Finally, Defendants' intentional conduct transgresses the bounds of socially tolerable conduct and caused Plaintiffs to suffer emotional distress which is actionable under Oregon tort law.

Plaintiffs request a declaration that Defendants' conduct violates FACE, RICO, ORICO, and state law, and is not protected by the First Amendment of the United States Constitution. Furthermore, Plaintiffs seek an injunction preventing Defendants from continuing to violate FACE,

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(e) Cause or continue a strike, boycott or other collective action injurious to some person's business, except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act * * *.

6 Section 1962(d) prohibits conspiracies to violate RICO: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

7 Section 166.720(3) makes it "unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt."

8 Section 166.720(4) prohibits "any person to conspire or endeavor to violate any of the provisions of subsections (1), (2) or (3) of this section."

ORICO, and any other laws by publishing the Deadly Dozen List and similar posters. In sum, Plaintiffs demand compensatory damages of at least $200 million, punitive damages of at least $300 million, and treble damages of at least $300 million.

In response to Plaintiffs' allegations, Defendants moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction, under Rule 12(b)(6) for failure to state a claim, and under Rule 12(c) for judgment on the pleadings. I examine these motions below.

STANDARD

On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, plaintiff bears the burden of establishing jurisdiction. *Farmers Ins. Ex. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990). However, "[w]here [as here] a district court acts on a defendant's motion to dismiss under Rule 12(b)(2) without holding an evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). That is, plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant. *Id.*

A Rule 12(b)(6) motion to dismiss for failure to state a claim can be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995); *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *National Wildlife Federation v. Espy*, 45 F.3d 1337, 1340 (9th Cir. 1995); *Everest and Jennings v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). Similarly, a Rule 12(c) motion for "judgment on the pleadings is appropriate when,

even if all allegations in the complaint are true, the moving party is entitled to judgment as a matter of law." *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993) (citing *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990)).

DISCUSSION

Although many of the Defendants filed separate Motions to Dismiss and briefs in support of those motions, most of the arguments address identical issues or adopted analyses in other Defendants' memoranda. Therefore, unless otherwise designated, I consolidate and address the Defendants' contentions together.

Defendants maintain that this Court lacks personal jurisdiction over Defendants and they also attack each of Plaintiffs' seven causes of action. I address each ground for dismissal in turn.

I. Personal Jurisdiction

A. Individual Defendants' Arguments[9]

Defendants contend that this Court may not assert general jurisdiction over them for several reasons: (1) they were not physically served with the Complaint in Oregon; (2) they are not domiciled in Oregon; (3) they do not engage in substantial activities in Oregon; and (4) they did not expressly consent to this Court's exercise of jurisdiction over them. In addition, this Court cannot assert long-arm jurisdiction over Defendants because Plaintiffs' allegations do not sufficiently show that Defendants distributed threatening

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[9] Specifically, Defendants Mears, Dodds, Miller, Treshman, Dreste, Foreman, and Wysong join in this argument. These Defendants reside in the following states, respectively: New Hampshire, Kansas, Wisconsin, Maryland, Missouri, California, and Tennessee.

posters which were used or consumed in Oregon through the ordinary course of trade. Finally, Defendants argue that long-arm jurisdiction would also violate their due process rights because: (1) Defendants have not purposefully availed themselves of the privileges in Oregon; (2) Defendants' activities have not arisen out of forum-related activities; and (3) extension of jurisdiction would be unreasonable.

B. Plaintiffs' Arguments

In opposition, Plaintiffs assert that the Court may properly exercise jurisdiction because, through their activities with ACLA, Defendants are responsible for publication and distribution of the Dirty Dozen List which intentionally targets two Oregon physicians, Drs. James and Elizabeth Newhall, who are Plaintiffs in this action. Because Defendants directed their anti-abortion efforts directly against Oregon residents, they had purposeful contact with Oregon which resulted in the injury that is the subject of this lawsuit.

C. Analysis

Although seven Defendants join in Defendants Mears' and Dodds' argument in support of dismissal for lack of personal jurisdiction, only Defendants Mears, Dodds, Treshman, and Miller raised the defense of lack of personal jurisdiction in their first responsive pleading. Defendants Foreman, Wysong, and Dreste failed to dispute personal jurisdiction in their Answer. "A general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction." *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986) (citing Fed. R. Civ. P. 12(h)(1)), *cert. denied*, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987). Therefore, Defendants Foreman, Wysong and Dreste waived their right to dispute personal jurisdiction, and I address this argument only with respect to Defendants Mears, Dodds, Miller, and Treshman.

Personal jurisdiction over a non-resident defendant is tested by a two-part analysis: the exercise of jurisdiction must (1) satisfy the requirements of the applicable federal statute governing personal jurisdiction,[10] or if none exists, the

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[10] RICO contains an applicable provision governing service of process, 18 U.S.C. § 1965(b) which provides:

> In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

In federal question cases, a court has personal jurisdiction over non-resident defendants only if they are amenable to service of process and the exercise of jurisdiction comports with due process. *Omni Capital International v. Rudolf Wolff & Co.*, 484 U.S. 97, 111, 108 S.Ct. 404, 413, 98 L.Ed.2d 415 (1987). Section 1965(b) of RICO allows nationwide service provided that "the court * * * ha[s] personal jurisdiction over at least one of the participants in the alleged multidistrict conspiracy and the plaintiff * * * show[s] that there is no other district in which a court will have personal jurisdiction over all of the alleged co- conspirators." *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 539 (9th Cir. 1986). Therefore, section 1965(b) permits a district court to exercise jurisdiction over all RICO co-conspirators if the court has personal jurisdiction over only one of the defendants. *See Hawkins v. Upjohn Co.*, 890 F. Supp. 601, 606 (E.D.Tex.1994) (examining whether only one of several RICO co-conspirator defendants was subject to the Texas long-arm statute within the due process limits).

Although § 1965(b) does not completely obviate the need for applying the traditional due process "minimum contacts" analysis with respect to the forum State, plaintiffs need only show that this court could exercise personal jurisdiction, without offending due process, over one of the RICO co-conspirators. Conversely, under the traditional "minimum contacts" analysis, to comport with due process, a defendant must have certain "minimum contacts" with the forum State and "[e]ach defendant's contacts with the forum State must be assessed individually." *Calder v. Jones*, 465 U.S. 783, 788-90, 104 S.Ct. 1482, 1486-87, 79 L.Ed.2d 804 (1984).

long-arm statute of the state in which the district court sits; and (2) comport with principles of federal due process. *Terracom v. Valley Nat. Bank*, 49 F.3d 555, 559 (9th Cir. 1995). Oregon's long-arm statute, ORCP 4, confers jurisdiction to the extent permitted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Gray & Co. v. Firstenberg Machinery Co.*, 913 F.2d 758, 760 (9th Cir. 1990) (citing ORCP 4L;[11] *Oregon ex rel. Hydraulic Servocontrols Corp. v. Dale*, 294 Or. 381, 384, 657 P.2d 211 (1982)). Therefore, because Oregon's long-arm statute is coextensive with the outer limits of federal due process, I need only analyze the second prong of the personal jurisdiction test. *Chan v. Society Expeditions*, Inc., 39 F.3d 1398, 1405 (9th Cir. 1994).

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has 'certain minimum contacts * * * such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' [citation omitted]." *Calder v. Jones*, 465 U.S. 783, 788, 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804 (1984) (quoting *International Shoe Co. v.*

In the present action, several alleged co-conspirator Defendants reside in Oregon; therefore, under section 1965(b), this Court has nationwide jurisdiction over all other co-conspirator Defendants. Consequently, the traditional "minimum contacts" analysis is not required for Plaintiffs' RICO claims. Nevertheless, I examine personal jurisdiction of the non-resident Defendants with regard to the other federal and state law claims.

[11] Oregon's long-arm statute, ORCP 4, lists several specific instances where the court may exercise personal jurisdiction over a defendant, and then adds in ORCP 4L, "Notwithstanding a failure to satisfy the requirement of sections B through K of this rule, [a court has personal jurisdiction] in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States."

Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). For a defendant to be subject to general personal jurisdiction, he must have such "continuous and systematic contacts with the forum that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice." *Reebok Intern. Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir. 1995), *cert. denied*, 516 U.S. 908, 116 S.Ct. 276, 133 L.Ed.2d 197 (1995). However, where, as here, the defendant's contacts with the forum are not continuous and systematic, the forum may exercise only specific personal jurisdiction, which is determined by the following three-part test:

> "(1) The nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable."

Id. (quoting *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1485 (9th Cir. 1993)).

1. Purposeful Availment

"This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person." *Burger*

King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985) (citations and internal quotation marks omitted) (merely contracting with a resident of a forum state is insufficient to confer specific jurisdiction over a nonresident). Different standards for purposeful availment apply to tort cases, as compared to contract cases. *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995) (extended specific jurisdiction to nonresident defendants who caused plaintiff to be unlawfully arrested in the forum state). Unlike a contract case (e.g. *Burger King*), in a tort case, "jurisdiction may attach if an out-of-forum defendant merely engages in conduct aimed at, and having effect in, the situs state." *Ziegler*, 64 F.3d at 473 (citing *Roth v. Garcia Marquez*, 942 F.2d 617, 621 (9th Cir. 1991)).

"[T]he three elements of purposeful availment in tort cases are: (1) intentional action; (2) aimed at the forum state; and (3) causing harm that the defendant should have anticipated would be suffered in the forum state." *Ziegler*, 64 F.3d at 474 (citing *Core-Vent* at 1486). The lack of physical contact with the forum does not necessarily defeat jurisdiction. *Calder*, 465 U.S. at 788, 104 S.Ct. at 1486 (personal jurisdiction proper where nonresident's wrongdoing is intentionally directed at a resident); *Ziegler*, 64 F.3d at 474.

In the present action, Plaintiffs assert a claim under state tort law, as well as claims under FACE, RICO, ORICO, which all involve tortious-type conduct. Therefore, in determining whether Defendants purposefully availed themselves of this forum, I apply the analysis for tort cases, set forth in *Ziegler*.

According to Plaintiffs' factual allegations, Defendant ACLA, "acting through and in active concert with each of the other defendants, publicly announced and released into interstate commerce" the Deadly Dozen List which targeted two Oregon Plaintiffs by listing their names and addresses.

Compl. ¶ 40, Ex. A. "Defendants intended for the Deadly Dozen List to instill fear in the doctors specifically named therein * * * [and] have distributed and continue to distribute the Deadly Dozen List throughout the United States, with the intent to spread their message of violence against plaintiffs and to intimidate plaintiffs and cause them serious physical and emotional harm." Compl. ¶¶ 41, 43. As Plaintiffs document in their Complaint, lists or posters similar to those distributed by Defendants have resulted in death or injury to other doctors who perform abortions.

These factual allegations show that Defendants targeted two Oregon doctors with the intention to instill fear in the doctors and cause them serious physical and emotional harm. Therefore, the purposeful availment requirements of *Ziegler* are easily met: Defendants' wrongful conduct was aimed directly at two Oregon doctors who Defendants knew were in Oregon and who Defendants clearly anticipated and hoped would suffer the intended harm. Consequently, I find that all Defendants purposefully availed themselves of Oregon law.

2. Arising Out Of

The claims arise out of a defendant's forum-related activities if plaintiff would not have a cause of action "but for" defendant's contacts with the forum. *Ziegler*, 64 F.3d at 474. The "but for" test should not be narrowly applied; rather, the requirement is merely designed to confirm that there is some nexus between the cause of action and defendant's contact with the forum. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). As in *Ziegler*, there is no dispute in this case that "but for" the contacts between Defendants and Oregon, the Oregon Plaintiffs would not have suffered the injury which is the subject of this lawsuit against Defendants. *Ziegler* 64 F.3d at

474. Therefore, Plaintiffs' alleged injuries arise out of Defendants' contact with Oregon.

3. Reasonableness of Exercising Jurisdiction

In determining whether exercise of jurisdiction is reasonable, the court must weigh all of the following seven factors:

> (1) the extent of the defendant's purposeful injection [sic] into the forum;
>
> (2) the defendant's burdens from litigating in the forum;
>
> (3) the extent of conflict with the sovereignty of the defendant's state;
>
> (4) the forum state's interest in adjudicating the dispute;
>
> (5) the most efficient judicial resolution of the controversy;
>
> (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and
>
> (7) the existence of an alternative forum.

Ziegler, 64 F.3d at 475 (citing *Terracom v. Valley Nat. Bank*, 49 F.3d 555, 561 (9th Cir. 1995)). No single factor is dispositive. *Terracom* at 561 (citing *Core-Vent*, 11 F.3d at 1488). I address each factor in turn.

a. Purposeful Interjection

"[T]he extent of interjection is to be considered: 'Even if there is sufficient interjection into the state to satisfy the [purposeful availment prong], the degree of interjection is

a factor to be weighed in assessing the overall reasonableness of jurisdiction under the [reasonableness prong]." *Core-Vent*, 11 F.3d at 1488 (quoting *Insurance Company of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1271 (9th Cir. 1981) (internal quotation marks omitted)). Like *Ziegler*, where Florida defendants caused a California plaintiff to be arrested in California, in this case, Defendants significantly interjected into Oregon by publishing and nationally distributing threats directed at two Oregon Plaintiffs. The harmful effects in Oregon caused by Defendants' actions were not merely incidental; rather, Defendants intentionally directed their actions towards Oregon so that the Oregon Plaintiffs would be physically and emotionally injured. *See Ziegler*, 64 F.3d at 475 ("[defendants] intentionally directed their actions towards California, for the purpose of having [plaintiff] arrested there and extradited. Their purposeful injection [sic] into California was significant."). Consequently, Defendants' significant interjection into Oregon, for the purpose of injuring the Oregon Plaintiffs, weighs in favor of exercising jurisdiction here.

b. Burden on Defense

The second factor concerns Defendants' burden in litigating this case in Oregon. Unlike other cases involving nonresident defendants, the four Defendants in this case who challenge personal jurisdiction in Oregon are each from a different State: New Hampshire, Kansas, Wisconsin, and Maryland. As a collective group, no one State is less burdensome than another for the Defendants. However, for each individual Defendant, their resident State is obviously less burdensome than Oregon because none of the Defendants have significant physical contacts with Oregon. Accordingly, the burden on each Defendant in litigating in Oregon tips slightly in Defendants' favor.

c. Conflict with Nonresident State's Sovereignty

Although Defendants' States may have an interest in protecting their residents' rights under the First Amendment to the United States Constitution, their States have little interest in resolving claims which involve unprotected tortious conduct of their residents, as alleged by Plaintiffs. Therefore, interference with the sovereignty of the nonresident States is minimal and this third factor favors jurisdiction.

d. Forum State's Interest

Like other States, Oregon maintains a strong interest in providing an effective means of redress for its residents who are tortiously injured. *See Core-Vent*, 11 F.3d at 1489 (noting that California maintains a strong interest in providing redress to its residents who are tortiously injured). Therefore, this fourth factor also supports exercising personal jurisdiction.

e. Efficiency

Similarly, the fifth factor also weighs in favor of exercising jurisdiction in Oregon because Oregon contains more parties to this lawsuit than any other State. In evaluating this factor, the Ninth Circuit instructs that the court should look "'primarily at where the witnesses and the evidence are likely to be located.'" *Ziegler*, 64 F.3d at 475-76 (quoting *Core-Vent*, 11 F.3d at 1489). Because the parties will be witnesses in this action, Oregon contains a larger number of witnesses than any other single State. Although the four Defendants who oppose jurisdiction do not reside in Oregon, the following co- defendants are physically present in Oregon: ACLA, ALM, Burnett, Ramey, and Stover. Furthermore, five of the Plaintiffs are also located in Oregon: Planned Parenthood, Portland Feminist, Elizabeth Newhall,

James Newhall, and Karen Sweigert. Therefore, Oregon is the most efficient forum for resolution of this matter.[12]

f. Importance of Forum to Plaintiffs

Obviously, Plaintiffs would prefer to litigate in Oregon, but "mere preference on the part of the plaintiff for its home forum does not affect the balancing * * *." *Core-Vent*, 11 F.3d at 1490. Plaintiffs have not suggested that they cannot obtain identical relief in other States. However, the overwhelming majority of parties are physically present in Oregon; thus, it would be foolish to require Plaintiffs to seek redress in some other State where personal jurisdiction as to other Defendants may be lacking. This factor neither adds nor detracts from the reasons for exercising jurisdiction in Oregon.

g. Unavailability of Alternative Forum

As with the sixth factor above, Plaintiffs do not argue that no other forum exists. "'Plaintiff bears the burden of proving the unavailability of an alternative forum.'" *Ziegler*, 64 F.3d at 476 (quoting *Core-Vent*, 11 F.3d at 1490). Clearly, Plaintiffs could sue in another State. However, Plaintiffs' failure to satisfy this factor has little effect on the determination to exercise jurisdiction in this case.

h. Balancing Factors

In sum, factors 1 (purposeful interjection), 3 (non-forum States' sovereignty), 4 (Oregon's interest), and

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[12] The Court is mindful that this factor has recently been discounted because "'[m]odern advances in communications and transportation have significantly reduced the burden of litigating [out-of-state].'" *Caruth v. International Psychoanalytical Ass'n*, 59 F.3d 126, 129 (9th Cir. 1995) (quoting *Sinatra v. National Enquirer*, 854 F.2d 1191, 1199 (9th Cir. 1988)).

5 (efficiency), favor the Plaintiffs. At best, factors 2 (burden on Defendants), 6 (importance of forum to Plaintiffs), and 7 (alternative forum), tip in favor of Defendants. However, Defendants' purposeful interjection, Oregon's interest in providing redress to its residents, and efficiency, decisively tip the balance in Plaintiffs' favor towards exercising jurisdiction.

"Once purposeful availment has been established, the forum's exercise of jurisdiction is *presumptively reasonable*. To rebut that presumption, a defendant must present a *compelling* case that the exercise of jurisdiction would, in fact, be unreasonable." *Ziegler*, 64 F.3d at 476 (quoting *Roth v. Garcia Marquez*, 942 F.2d at 625 (internal quotation marks omitted; emphasis in original)). Because the balance of factors strongly favors Plaintiffs, Defendants cannot overcome the presumption that exercising jurisdiction would be reasonable. Consequently, this Court has specific personal jurisdiction over the non-resident Defendants who timely challenged jurisdiction: Mears, Dodds, Treshman, and Miller. Likewise, this Court has personal jurisdiction over all other Defendants because they either reside or are principally located in Oregon, or they waived their right to object to personal jurisdiction under Fed. R. Civ. P. 12(h)(1).

II. Prohibition Of Speech Protected By The First Amendment

A. Defendants' Arguments

Addressing the merits of Plaintiffs' claims, Defendants contend that Plaintiffs impermissibly seek to prohibit speech protected by the First Amendment. Defendants' anti-abortion protests are speech and may not be proscribed merely because they are offensive and intimidating to Plaintiffs. Furthermore, Defendants' oral statements and posters do not fall within the "fighting words" exception to protected speech because that expression does not incite

imminent lawless action which is likely to occur. In fact, Plaintiffs failed to alleged that their anti-abortion expressions either incite imminent violence or are likely to produce the violence. Therefore, based upon the undisputed allegations in the Complaint, Defendants' expressions are not "fighting words" and must be protected.

B. Plaintiffs' Arguments

Contrary to Defendants' characterization of Plaintiffs' theory, Plaintiffs do not contend that Defendants' expression must incite imminent violence to be forbidden. Instead, they argue that Defendants' actions constitute "true threats" which are prohibited by FACE and not protected by the First Amendment. Although Defendants' expression does not expressly threaten Plaintiffs, they assert that the expression becomes a "true threat" when placed in context. Therefore, by alleging the context surrounding Defendants' expression and its effect upon Plaintiffs, Plaintiffs have alleged sufficient facts to support the conclusion that Defendants' expression constitutes "true threats" which are not protected speech under the First Amendment.

C. Analysis

Plaintiffs seek to prohibit Defendants' conduct under FACE, 18 U.S.C. § 248, which regulates three types of activities: (1) the use of "force," (2) "threat[s] of force," and (3) "physical obstruction." 18 U.S.C. § 248(a). Only the second proscribed activity, "threats of force," constitutes expressive conduct eligible for protection under the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. 476, 484-85, 113 S.Ct. 2194, 2198-99, 124 L.Ed.2d 436 (1993) ("[a] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment"). Furthermore, FACE only forbids "threats of force" that "intimidate" which is defined as to "place a person in reasonable apprehension of bodily harm" *Id.* § 248(e)(3).

"True threats" are not protected by the First Amendment. *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (upholding statute that criminalized threats of violence against the president but concluding that the statement, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," was political hyperbole and not a "true threat" given its context); *see also R.A.V. v. St. Paul, Minn.*, 505 U.S. 377, 388, 112 S.Ct. 2538, 2546, 120 L.Ed.2d 305 (1992) ("threats of violence are outside the First Amendment"); *Melugin v. Hames*, 38 F.3d 1478, 1484-86 (9th Cir. 1994) (upholding constitutionality of statute, as interpreted by the Alaska Court of Appeals, which criminalized threats of death or physical injury). However, statutes which punish "a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind." *Watts*, 394 U.S. at 707, 89 S.Ct. at 1401. Therefore, "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Id.* Consequently, to the extent Plaintiffs seek to prohibit "true threats" under FACE, the First Amendment is not violated.[13] The issue then is determining whether Defendants' expressive conduct constitutes a "true threat."

The Ninth Circuit recently restated the objective test used to resolve the issue of whether a threat is a true threat:

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[13] Contrary to Defendants' assertions, Plaintiffs are not pursuing an incitement to violence theory, see *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1968) (expression which likely incites others to imminent violence is unprotected under the First Amendment), but rather allege that Defendants intended to harm specific Plaintiffs, as evidenced by Defendants' threats. *See United States v. Dinwiddie*, 76 F.3d 913, 922 n.5 (8th Cir. 1996) ("The *Brandenburg* test applies to laws that forbid inciting someone to use violence against a third party. It does not apply to statutes, like FACE, that prohibit someone from directly threatening another person"), petition for cert. filed, (U.S. Aug. 6, 1996) (No. 96-5615).

> "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990). Furthermore, "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." *Id.* (citing *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989), *cert. denied*, 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1044 (1990) and *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir. 1987)); *accord United States v. Kelner*, 534 F.2d 1020 (2d Cir.) ("So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific * * * as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied."), *cert. denied*, 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976).

Lovell v. Poway Unified School District, 90 F.3d 367, 372 (9th Cir. 1996). Under this test, the plaintiff need not prove that the defendant had the ability or actually intended to physically harm the plaintiff. *Melugin*, 38 F.3d at 1485. "Moreover, the issue whether the [plaintiff] has shown a 'true threat' is a question of fact for the jury, not a question of law for the court." *Id.* (citing *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990)).

In *Lovell*, a student told a school counselor, "If you don't give me this schedule change, I'm going to shoot you!" *Lovell*, 90 F.3d at 369. The counselor informed the school about the student's statement; in response, the school suspended the student. *Id.* The student's parents filed suit on

behalf of the student, claiming, in part, that the suspension violated the student's First Amendment rights by punishing her speech. *Id.* at 370. The Ninth Circuit concluded that the suspension did not violate the student's First Amendment rights because threats of violence are not protected speech and "[a] reasonable person in these circumstances would have foreseen that [the counselor] would interpret that statement as a serious expression of intent to harm." *Id.* at 372. Thus, a true threat exists if the target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others to act at a level less than incitement — it is the perception of a reasonable person that is dispositive, not the actual intent of the speaker.

Unlike in *Lovell*, the alleged threats in this case are not so easily identified in the Complaint. Nevertheless, federal notice pleading standards are not strict and motions to dismiss are not granted "unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claims which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Plaintiffs allege that "Defendants have distributed and continue to distribute the Deadly Dozen List throughout the United States, with the intent to spread their message of violence against plaintiffs and to intimidate plaintiffs and cause them serious physical and emotional harm." Compl. ¶ 43, Ex. A. Furthermore, "[b]y creating and circulating [a poster targeting Plaintiff Crist], the defendants intend to place Dr. Crist * * * in reasonable fear of bodily harm should he continue to perform abortions * * *." *Id.* ¶ 48, Ex. B. Viewing the Deadly Dozen List and the Crist poster in the factual context of previous "unwanted"-style posters which listed names of other doctors who were subsequently assaulted or murdered, I cannot conclude as a matter of law that a reasonable person in these circumstances would not foresee that the Plaintiffs would interpret the Deadly Dozen List and Crist poster as serious expressions of intent to harm. *See Lovell*, 90 F.3d at 372-73 ("Alleged threats should be

considered in light of their entire factual context, including the surrounding events and the reaction of the listeners. * * * Given the level of violence in public schools today, it is no wonder that [the counselor] felt threatened. * * * [Nevertheless,] the final result turns upon whether a reasonable person in these circumstances should have foreseen that his or her words would have this effect." (internal quotation marks omitted)). Therefore, Defendants have not shown that Plaintiffs can prove no set of facts in support of their claim because Defendants' speech may be unprotected "true threats."[14]

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[14] Defendants raised several new arguments in their Reply Brief, to which Plaintiffs have not been given an opportunity to respond. Defendants contend that (1) their expressions are not express threats and the context cannot convert the expressions into threats, (2) Defendants' expressions were public threats which must be likely to cause imminent lawless action to be actionable, and (3) the court, not a jury, determines whether a "true threat" exists.

First, although the Deadly Dozen List and the Crist poster made their alleged threats implicitly, instead of expressly stating, "We're going to kill you!," the threats are no less fearsome when couched in the context of the effect of previous posters, as well as statements by Defendants like Defendant McMillian who said, shortly after the murder of two doctors who were listed on posters, "In my opinion a sure way for the abortionists to be safe would be to have a cease-fire--the abortionists stop killing babies, then anti-abortionists would stop shooting abortionists." Compl. ¶ 69. Nothing in the objective test for "true threats" suggests that the threat of violence must be express. *See Lovell*, 90 F.3d at 372; *see also United States v. Gilbert*, 884 F.2d 454, 455-57 (9th Cir. 1989) (examining what a letter and enclosed poster implied to determine whether they constituted an unprotected threat), *cert. denied*, 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1044 (1990).

Second, the fact that the threats were publicly announced instead of privately stated does not affect the test for determining whether the threat is a "true threat." For instance, it would be absurd if a plaintiff would have to satisfy the stringent standard of imminent lawless action where the speaker threatens the plaintiff using a public television broadcast, but only have to show that a reasonable person

However, the Court agrees with the observation by the American Civil Liberties Union ("ACLU"), as *amicus curiae*, that Plaintiffs do not clearly separate the expression that constitutes a "true threat" from the context of the expression.[15] In addition, Plaintiffs do not clearly identify the individual Defendants who are responsible for the threats. "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 920, 102 S.Ct. 3409, 3429, 73 L.Ed.2d 1215 (1982). Therefore, Plaintiffs are given leave to amend their Complaint in order to clearly distinguish between the allegedly actionable and the contextual expressions, as well as specifically name the individual Defendants who intended to further the alleged threats of violence.[16]

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would foresee that the recipient would interpret the threat as a serious expression of an intent to harm where the speaker threatens the plaintiff in a private letter.

Third, as stated earlier in this Opinion, contrary to Defendants' assertions, the jury determines whether a threat constitutes a "true threat." *See Melugin*, 38 F.3d at 1485 (citing *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990), *cert. denied*, 498 U.S. 986, 111 S.Ct. 522, 112 L.Ed.2d 533 (1990)).

[15] In ruling on this motion, the Court interpreted the Complaint as attacking only the Deadly Dozen List and the Crist poster, with all other expressions providing factual context.

[16] Furthermore, Plaintiffs should be aware that there are serious questions concerning each Plaintiff's standing to assert the causes of action in the Complaint. I decline to resolve the issue at this juncture because Defendants have not raised it, but standing should be addressed by the parties as soon as possible. *See National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 255, 114

III. Constitutionality Of FACE

A. Defendants' Arguments

Defendants argue that FACE violates the Commerce Clause because it regulates activity which is not sufficiently connected to interstate commerce. Second, the Fourteenth Amendment does not authorize Congress to regulate solely private conduct through FACE. Third, Defendants contend that FACE is facially unconstitutional under the First Amendment for several reasons: (1) the statute impermissibly bans speech based on its anti-abortion viewpoint; (2) FACE imposes a content-based restriction by regulating speech based upon whether it intimidates the listener; and (3) FACE is unconstitutionally vague and overbroad because it fails to define key terms and regulates speech that does not fall within the categories of "fighting words" or "imminent threats of lawless action."

B. Plaintiffs' Arguments

Plaintiffs respond by arguing first that Congress rationally concluded that the conduct regulated by FACE (*e.g.*, violence, threats of violence, and physical obstructions aimed at persons who provide abortions) affects interstate commerce. Furthermore, Congress crafted FACE so that it was reasonably tailored to regulate such conduct. Therefore, Congress properly regulates such conduct under the Commerce Clause.

Second, Plaintiffs reject Defendants' suggestion that FACE must regulate state action, in order to be valid under the Fourteenth Amendment. The relevant inquiry is whether

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S.Ct. 798, 802, 127 L.Ed.2d 99 (1994) ("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation").

Congress possessed authority under the Constitution for enacting FACE, not whether Congress seeks to regulate state action.

Third, Plaintiffs maintain that FACE passes constitutional muster under the First Amendment because it is viewpoint and content neutral. In addition, FACE is not constitutionally overbroad because it regulates only unprotected expression. Moreover, the statute is also not unconstitutionally vague because it clearly defines the prohibited activity.

C. Analysis

In relevant part, FACE enables persons who provide or seek reproductive services to recover civil remedies against anyone who:

> [B]y force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services * * *.

18 U.S.C.A. § 248. Defendants' constitutional attacks of this statute are addressed individually below.

1. Commerce Clause

The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce [citation omitted], *i.e.*, those activities

that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, ---- - ----, 115 S.Ct. 1624, 1629-30, 131 L.Ed.2d 626 (1995) (struck down the Gun-Free School Zones Act of 1990 which criminalized possession of firearms in school zones because the statute failed to regulate activity that substantially affects interstate commerce) (citing *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27, 88 S.Ct. 2017, 2024 n.27, 20 L.Ed.2d 1020 (1968)). "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1630. "'Even activity that is purely intra-state in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.'" *Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 277, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981) (holding that the Surface Mining Control and Reclamation Act of 1977, which mandates compliance with environmental standards, did not contravene the Commerce Clause) (quoting *Fry v. United States*, 421 U.S. 542, 546, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975)).

In determining whether a particular exercise of congressional power is valid under the Commerce Clause, "[t]he court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel*, 452 U.S. at 276, 101 S.Ct. at 2360. "This established, the only remaining question for the judicial inquiry is whether 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.'" *Hodel*, 452 U.S. at 276, 101 S.Ct. at 2360 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262, 85 S.Ct. 348, 360, 13 L.Ed.2d 258 (1964)) (concluding that Congress had authority under the Commerce Clause to enact the Civil Rights Act of 1964 because restaurants that discriminated served fewer customers, and therefore suppressed interstate commerce).

In the present action, Congress made the following findings when it enacted FACE:

> (1) An interstate campaign of violent, threatening, obstructive and destructive conduct aimed at providers of reproductive health services across the nation has injured providers of such services and their patients, and the extent and interstate nature of this conduct place it beyond the ability of any single state or local jurisdiction to control;
>
> (2) Such conduct, which has included blockades and invasions of medical facilities, arson and other destruction of property, assaults, death threats, attempted murder and murder, infringes upon the exercise of rights secured by federal and state law, both statutory and constitutional;
>
> (3) Such conduct also burdens interstate commerce by forcing patients to travel from states where their access to reproductive health services is obstructed to other states, and by interfering with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states * * *.

H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 7 (1994), *reprinted* in 1994 U.S.C.C.A.N. 699, 724; *see also* H.R. Rep. No. 306, at 6-10 (1993) *reprinted* in 1994 U.S.C.C.A.N. 699, 703-707 (explaining the need for federal remedies to protect patients and providers of reproductive health services); *see also* S. Rep. No. 117, at 31-32 (1993).

Based upon its extensive findings, Congress rationally concluded that violence, threats of force, and physical obstructions directed at persons seeking or providing reproductive health services substantially affect interstate commerce. Furthermore, all circuits which have addressed the issue agree that Congress rationally concluded that the activity regulated by FACE substantially affects interstate commerce. *See United States v. Soderna*, 82 F.3d 1370, 1373-74 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141); *United States v. Dinwiddie*, 76 F.3d 913, 920-21 (8th Cir. 1996), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); *United States v. Wilson*, 73 F.3d 675, 680-83 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3669 (Mar. 20, 1996) (No. 95-1523); *Cheffer v. Reno*, 55 F.3d 1517, 1519-21 (11th Cir. 1995); *American Life League, Inc. v. Reno*, 47 F.3d 642, 647 (4th Cir. 1995), *cert. denied*, 516 U.S. 809, 116 S.Ct. 55, 133 L.Ed.2d 19 (1995). I agree with the Fourth Circuit in *Reno*, which concluded that "Congress also chose regulatory means reasonably adapted to permissible ends [because] [t]he Act's criminal and civil penalties are designed to deter violent, obstructive and destructive conduct." 47 F.3d at 647 (listing the Act's permissible ends). Therefore, in accord with all circuit courts that have examined whether Congress permissibly invoked its commerce power to enact FACE, I conclude that FACE is a constitutional exercise of Congress' power under the Commerce Clause.[17]

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[17] In so holding, I reject Defendants' argument that a different result is compelled by *Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995), for two reasons: (1) unlike the extensive congressional findings which accompanied FACE, in *Lopez*, Congress made no findings which explained how the statute regulated activity affecting interstate commerce; and (2) unlike FACE's regulation of commercial activity with regard to the provision of health services, the statute in *Lopez* did not regulate any commercial activity. *See Dinwiddie*, 76 F.3d at 921; *Wilson*, 73 F.3d at 683-84; *Cheffer*, 55 F.3d at 1520.

2. First Amendment

The First Amendment of the United States Constitution provides, in part, that "Congress shall make no law * * * abridging the freedom of speech * * *." "The First Amendment generally prevents government from proscribing speech, *see, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 309-311 [60 S.Ct. 900, 905-06, 84 L.Ed. 1213] (1940), or even expressive conduct, *see, e.g., Texas v. Johnson*, 491 U.S. 397, 406 [109 S.Ct. 2533, 2540-41, 105 L.Ed.2d 342] (1989), because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid" *R.A.V. v. St. Paul, Minn.*, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992). Furthermore, "[w]hen the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. *See R.A.V. v. St. Paul, Minn.*, 505 U.S. 377, 391 [112 S.Ct. 2538, 2547-48, 120 L.Ed.2d 305] (1992). Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger, et al., v. Rector and Visitors of the University of Virginia, et al.*, 515 U.S. 819, ----, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)).

Regulations which "suppress, disadvantage, or impose differential burdens upon speech because of its content" are valid under the First Amendment only if they survive strict scrutiny, *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, ----, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497 (1994),

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Because I hold that FACE is within Congress' commerce authority, I need not consider Defendants' argument that Congress does not have authority under the Fourteenth Amendment to enact FACE.

which requires Congress to "show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991). However, where the regulation is content-neutral, it need only satisfy "an intermediate level of scrutiny," *Turner*, 512 U.S. at ----, 114 S.Ct. at 2459, which upholds the regulation if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968); *see also Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983) (applying intermediate level of scrutiny to time, place, and manner restrictions on speech). Therefore, I must first determine whether FACE is content and viewpoint neutral, and then apply the proper level of scrutiny under the First Amendment.

a. Content- and Viewpoint-Based

Several circuits have addressed the issue of whether FACE is content- and viewpoint-based, and I concur in their well-reasoned conclusions. *See Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996); *American Life League*, 47 F.3d 642, 651 (4th Cir. 1995); *Cheffer*, 55 F.3d 1517, 1521 (11th Cir. 1995) (expressly adopting rationale set forth in *American Life League*). However, I offer a brief analysis in addition to the Eighth, Fourth, and Eleventh Circuits' discussions.

As discussed earlier in Part II.C. of this Opinion, FACE regulates the use of force, threats of force, and physical obstruction, which are activities that are not protected under the First Amendment. The fact that application of FACE is based upon whether the victim of a threat of violence is placed in "reasonable apprehension of bodily harm," does not

cause the statute to become content-based, like the ordinance in *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992),[18] because threats of violence are not protected under the First Amendment. *See Dinwiddie*, 76 F.3d at 922.

Furthermore, FACE is not viewpoint-based merely because its application is limited to force, threats of force, or physical obstruction against a person because that person obtains or provides reproductive health services. Congress may "single[ ] out" specific types of conduct "because this conduct is thought to inflict greater individual or societal harm," *Mitchell*, 508 U.S. at 487-88, 113 S.Ct. at 2201 (upholding statute that enhances sentences for crimes motivated by racial bias), so long as no distinction is made based upon the expressive content or viewpoint of the conduct, *see R.A.V.*, 505 U.S. 377, 391-94, 112 S.Ct. 2538, 2547-49 (striking down ordinance that regulated certain types of "fighting words" which insulted or provoked violence "on the basis of race, color, creed, religion or gender" because the ordinance distinguished application based on the content and viewpoint of the "fighting words").

Unlike the ordinance in *R.A.V.*, FACE is not viewpoint-based because it prohibits all conduct regardless of the violator's viewpoint so long as that conduct is directed towards a person merely because that person obtains or

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[18] In *Forsyth*, the Supreme Court struck down an ordinance which calculated permit fees for parades based on the cost of security for parade participants which varied depending on the listeners' reaction to the speech. 505 U.S. at 134-36, 112 S.Ct. at 2403-05. The Court noted that the administrator, in assessing the cost of the permit, would necessarily have to examine the contents of the message conveyed, estimate the response of others to that content, and judge the number of police necessary to meet that response. *Id.* at 134, 112 S.Ct. at 2403. However, *Forsyth*, unlike the present action, involved speech protected under the First Amendment.

provides reproductive health services. *See R.A.V.*, 505 U.S. at 390, 112 S.Ct. at 2546-47 ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."); *see also Dinwiddie*, 76 F.3d at 923; *American Life League*, 47 F.3d at 650-51.[19] The mere fact that a class of persons with a particular viewpoint are more likely to violate the statute does not render the law a viewpoint-based regulation of speech. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, ----, 114 S.Ct. 2516, 2524, 129 L.Ed.2d 593 (1994) ("That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order" which established a 36-foot buffer zone from which demonstrators were prohibited); *see, e.g., O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (upholding a statutory prohibition on burning draft cards despite the fact that most violators would likely oppose the Vietnam War).

Consequently, like the Eighth, Fourth, and Eleventh Circuits, I conclude that FACE is a content-neutral and viewpoint-neutral regulation. Therefore, I apply an intermediate level of scrutiny to determine whether the

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[19] Moreover, FACE's proscription of conduct directed at persons *because* they obtain or provide reproductive medical services is not content- or viewpoint-based because statutes may proscribe conduct based upon the motive of the violator without impermissibly regulating the content of the expression. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S.Ct. 2229, 2235, 81 L.Ed.2d 59 (1984) (upholding Title VII which makes it unlawful for an employer to discriminate against an employee "*because* of such an individual's race, color, religion, sex, or national origin." (quoting 42 U.S.C. § 2000e-2(a)(1) (emphasis added)).

statute's incidental burdens on protected speech violate the First Amendment.[20]

b. Intermediate Scrutiny Under *O'Brien*

A statute survives intermediate scrutiny if (1) it is content-neutral, (2) it furthers an important or substantial governmental interest, and (3) the restriction is narrowly tailored to further that interest. *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679. "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner*, 512 U.S. 622, ----, 114 S.Ct. 2445, 2469. "Rather, the requirement of narrow tailoring is satisfied so long as the * * * regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989)) (internal quotation marks omitted).

FACE furthers the government's "strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy," *Madsen*, 512 U.S. at ----, 114 S.Ct. at 2526 (citing *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)), as well as the government's interest in "protecting patients and

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[20] Arguably, if FACE only regulates unprotected speech in a content- and viewpoint-neutral manner, I need not even apply the intermediate level of scrutiny to FACE. *Melugin*, 38 F.3d at 1483-84 (statutes which regulate unprotected expression need only be "rationally related to a legitimate state interest"). However, because FACE's regulation of unprotected conduct "'incidentally affect[s] some conduct with protected expressive elements, such as peaceful but obstructive picketing,'" *Dinwiddie*, 76 F.3d at 923 (quoting *American Life League*, 47 F.3d at 648), I must consider whether these burdens on protected speech violate the First Amendment under intermediate scrutiny.

staff from violence and harm and protecting reproductive health facilities from physical destruction or damage." *American Life League*, 47 F.3d at 651. These interests are substantial and support any incidental burdens on protected speech caused by FACE, so long as the burdens are no greater than necessary to further the government's interests. FACE regulates only force, threats of force, and physical obstruction; thus, it "'leaves open ample alternative means for communication,'" and is narrowly tailored to further the government's interests. *Dinwiddie*, 76 F.3d at 923 (quoting *American Life League*, 47 F.3d at 652) ("In a non-violent, non-obstructive manner, protestors may still stand and express their anti-abortion message. They may still proclaim their views and make their pleas by voice, signs, handbills, symbolic gestures and other expressive means").

In sum, I conclude, as did the Eighth, Fourth, and Eleventh Circuits, that FACE serves substantial government interests in preventing violence and preserving access to reproductive health services, and is narrowly tailored to further those interests, without targeting the content of the expression. *See Dinwiddie*, 76 F.3d at 924; *American Life League*, 47 F.3d at 652; *Cheffer*, 55 F.3d at 1521-22.

c. Vagueness and Overbreadth

In addition, I reject Defendants' argument that FACE is unconstitutionally vague because terms like "obstruction," "interference," and "threat of force" are unclear, and "intimidate" is based upon the subjective reaction of third parties. "A statute is void for vagueness when it does not sufficiently identify the conduct that is prohibited." *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996). Therefore, the statute must "be sufficiently clear so as not to cause persons 'of common intelligence * * * necessarily [to] guess at its meaning and [to] differ as to its application [.]'" *Id.* (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)).

In the present action, all the challenged terms, except for "threat of force," are defined by the statute. For instance, FACE defines "intimidate" as to "place a person in reasonable apprehension of bodily harm to him- or herself or to another," "interfere with" as to "restrict a person's freedom of movement," and "physical obstruction" as "rendering impassable ingress to or egress from a facility that provides reproductive health services * * *." 18 U.S.C. § 248(e)(2), (3), and (4). These specific and clear definitions, by themselves, are sufficient to defeat Defendants' vagueness challenge. Nonetheless, further support for this conclusion is found in *United States v. Gilbert*, 813 F.2d 1523 (9th Cir. 1987), where the Ninth Circuit held that the terms "threat of force," "intimidate," and "interfere with," as used in the Fair Housing Act, 42 U.S.C. § 3631 (1982) (prohibits anyone who "by force or threat of force * * * intimidates or interferes with * * * any person because of his race, color, religion, sex, or national origin * * *") are not unconstitutionally vague.[21] 813 F.2d at 1530. In so holding, the court emphasized that "legislation which proscribes the use of force or the threat of force should not be found to be void for vagueness." *Id.* I see no reason for a different result in this case; FACE is not unconstitutionally vague. *See Dinwiddie*, 76 F.3d at 924; *Cheffer*, 55 F.3d at 1521-22, *American Life League*, 47 F.3d at 653.

Likewise, I also reject Defendants' contention that FACE is unconstitutionally overbroad because it regulates speech that does not fall within two of the categories of

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[21] Likewise, in *Cameron v. Johnson*, the Supreme Court rejected a vagueness challenge to an anti-picketing ordinance which included the terms "interfere with" and "obstruct." 390 U.S. 611, 612 n.1, 616, 88 S.Ct. 1335, 1336 n.1, 1338, 20 L.Ed.2d 182 (1968) (ordinance prohibited "picketing * * * in such a manner as to *obstruct* or unreasonably *interfere with* free ingress or egress to and from any * * * county * * * courthouses * * *.") (Emphasis added).

exclusion from First Amendment protection: "fighting words" or "imminent threats of lawless action." As discussed earlier in Part II.C. of this Opinion, Plaintiffs do not claim that Defendants' actions constitute "fighting words" or an "incitement to imminent violence," but rather allege that Defendants are directing threats of violence at Plaintiffs. Therefore, the analyses under the "fighting words" and "incitement to imminent violence" doctrines do not apply here. Moreover, because true threats of violence are similarly not protected, I must reject Defendants' argument that FACE is overbroad.

Accordingly, I reject Defendants' vagueness and overbreadth arguments and hold that FACE does not violate the First Amendment. Furthermore, I also conclude that Plaintiffs have alleged sufficient facts to state a claim that Defendants' "unwanted"-style posters constitute "threats of violence" under FACE and overcome Defendants' Motion to Dismiss, pursuant to FRCP 12(b)(6).

However, although Plaintiffs succeed at this point in the litigation, there are several troubling issues with regard to their FACE claim that Plaintiffs may need to address in order to survive a motion for summary judgment: (1) whether all Plaintiffs have standing to assert a claim under FACE, (2) which specific conduct by Defendants constitutes "true threats," and (3) whether sufficient evidence warrants submitting to the jury the issue of whether Defendants' alleged conduct constitutes "true threats." At this early stage of the case, accepting all of Plaintiffs' factual allegations as true, I cannot say as matter of law that Plaintiffs have not stated a claim under FACE, but I harbor significant doubts as to whether Plaintiffs will possess sufficient evidence to create a material issue of fact for trial.

IV. RICO

To state a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), a plaintiff must show that the conduct of an enterprise, through a pattern of racketeering activity, injured plaintiff's business or property. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985). A "pattern" of racketeering activity does not exist unless there is evidence of at least two predicate acts. *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1152 (9th Cir. 1992). "Racketeering activity" is any act indictable under several provisions of Title 18 of the United States Code. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 541 (9th Cir. 1989) (citing 18 U.S.C. § 1961(1)) (listing the offenses).

Defendants attack Plaintiffs' RICO and ORICO claims on several grounds.[22] I address each of Defendants' contentions in turn.

A. Pleading Standard for RICO Claims

1. Arguments

First, Defendants argue that Plaintiffs failed to satisfy the heightened pleading standard mandated by Fed. R. Civ. P. 9(b)[23] for RICO claims by not pleading with particularity

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[22] Note that the arguments pertaining to RICO are equally applicable to ORICO because the statutes are interpreted consistently. *Pincetich v. Jeanfreau*, 699 F. Supp. 1469, 1475 (D. Or. 1988); *Ius v. Butcher*, 680 F. Supp. 343, 346 n.1 (D. Or. 1987); *Schnitzer v. Oppenheimer & Co., Inc.*, 633 F. Supp. 92, 99 (D. Or. 1985); *Ahern v. Gaussoin*, 611 F. Supp. 1465, 1494 (D. Or. 1985).

[23] Rule 9(b) states in relevant part, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

RICO "predicate acts" (*i.e.*, violations of federal and state criminal law) allegedly committed by Defendants.

In opposition to Defendants' Motion to Dismiss, Plaintiffs contend that they pleaded Defendants' "predicate acts" with sufficient particularity by alleging that Defendants' threats of violence in furtherance of a plan to commit extortion and/or coercion violated the Hobbs Act, 18 U.S.C. § 1951, and Oregon's coercion statute, ORS 163.275.

2. Analysis

Allegations of fraud must be stated with particularity. Fed. R. Civ. P. 9(b). Likewise, RICO claims based upon predicate acts involving fraud must be pleaded with particularity under Rule 9(b). *See Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991) (applying Rule 9(b) to allegations of mail fraud as RICO predicate acts), *cert. denied*, 502 U.S. 1094, 112 S.Ct. 1168, 117 L.Ed.2d 414 (1992); *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988) (applying Rule 9(b) to allegations of mail and wire fraud as RICO predicate acts), *cert. denied*, 493 U.S. 858, 110 S.Ct. 168, 107 L.Ed.2d 124 (1989); *Sun Sav. and Loan Ass'n v. Dierdorff*, 825 F.2d 187, 196 (9th Cir. 1987).

However, as in this case, where the alleged RICO predicate acts do not involve fraud, the more lenient pleading standard in Rule 8(a) applies.[24] *See McLaughlin v. Anderson*,

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[24] Rule 8(a) requires:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain
>
> (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it;

962 F.2d 187, 194 (2nd Cir. 1992) (distinguishing pleading standard for RICO claims involving fraud as compared to extortion, and holding that district court erred in applying Rule 9(b) to plaintiff's extortion claim: "the district court should have evaluated the [extortion] claim against the more lenient pleading standards of [Rule] 8(a)."); *Rose v. Bartle*, 871 F.2d 331, 356 n.33 (3rd Cir. 1989) ("It should be noted that the plaintiffs allege no mail, wire or other fraud by the defendants, and therefore are not required to adhere to the higher pleading standard of 'particularity' mandated by Fed. R. Civ. P. 9(b)"); *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 776 (7th Cir. 1994) (unless the RICO claim involves fraud, it must conform only to the standards set out in Rule 8). Because Plaintiffs allege RICO predicate acts involving extortion under 18 U.S.C. § 1951 (the Hobbs Act) and coercion under ORS 163.275 (Oregon Coercion Statute), rather than fraud, their RICO claims need not be pleaded with particularity under Rule 9(b).[25]

Under the liberal federal notice pleading standards under Rule 8, Plaintiffs need only provide "fair notice" of the claim being asserted and the "grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 45-46, 48, 78 S.Ct. 99, 101-02, 103, 2 L.Ed.2d 80 (1955). With regard to the RICO

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(2) a short and plain statement of the claim showing that the pleader is entitled to relief, and

(3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

[25] Defendants cite *Schnitzer v. Oppenheimer & Co., Inc.*, 633 F. Supp. 92 (D. Or. 1985), for the proposition that all RICO claims must be pleaded with particularity because "'RICO's *in terrorem* effect is potent, in that a RICO defendant faces the unsavory label 'racketeer' as well as the risk of treble damages.'" Miller and Treshman Mem. Supp. Mot. Dismiss at 24 (quoting Schnitzer, 633 F. Supp. at 97). However, that case is inapplicable to the present action because the predicate acts in Schnitzer were wire and mail fraud, 633 F. Supp. at 96, whereas the predicate acts here are extortion and coercion.

predicate acts of extortion and coercion, Plaintiffs have easily satisfied this liberal standard by alleging that Defendants violated 18 U.S.C. § 1951 and ORS 163.275 through issuing and disseminating the Deadly Dozen List, as well as other "unwanted"-style posters and publications which contain threats of force against Plaintiffs in order to induce fear in Plaintiffs and "thus to force plaintiffs to forego their right to engage in lawful activity and give up their actual and prospective business relations." Compl. ¶¶ 96-97. These allegations provide sufficient notice to Defendants of the predicate acts of extortion and coercion underlying Plaintiffs' RICO claims.

B. Predicate Acts: Hobbs Act and Oregon Coercion Statute

1. Arguments

Second, Defendants contend that Plaintiffs' RICO claims fail because the predicate act allegations under the Hobbs Act and the Oregon Coercion Statute are flawed for the following reasons: (1) Plaintiffs' do not state an extortion claim under the Hobbs Act because they fail to allege that Defendants unlawfully obtained Plaintiffs' property, and (2) the Oregon Coercion Statute, ORS 163.275, cannot be the basis for a RICO predicate act because ORS 163.275 is unconstitutionally overbroad.

In response, Plaintiffs maintain that they have presented a Hobbs Act extortion claim by alleging that Defendants prevented them from making business decisions free from threats. Furthermore, Plaintiffs properly rely on the Oregon Coercion Statute because the Oregon legislature corrected any overbreadth concerns in the statute after the Oregon Supreme Court declared it unconstitutional.

2. Analysis

a. Hobbs Act

"'The elements of a Hobbs Act violation are [1] extortion and [2] a nexus with interstate commerce.'" *United States v. Hoelker*, 765 F.2d 1422, 1424 (9th Cir. 1985) (quoting *United States v. Zemek*, 634 F.2d 1159, 1173 (9th Cir. 1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed.2d 341, 450 U.S. 985, 101 S.Ct. 1525, 67 L.Ed.2d 821 & 452 U.S. 905, 101 S.Ct. 3031, 69 L.Ed.2d 406 (1981)), *cert. denied*, 475 U.S. 1024, 106 S.Ct. 1219, 89 L.Ed.2d 330 (1986). The Hobbs Act defines "extortion" as "the obtaining of *property* from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). "The concept of property under the Hobbs Act has not been limited to physical or tangible 'things.' The right to make business decisions and to solicit business free from wrongful coercion is a protected property right." *Zemek*, 634 F.2d at 1174 (citing *United States v. Santoni*, 585 F.2d 667, 672-73 (4th Cir. 1978) (property extorted was the right of victim to make a business decision free from outside pressure wrongfully imposed), *cert. denied*, 440 U.S. 910, 99 S.Ct. 1221, 59 L.Ed.2d 459 (1979)) (other citations omitted); *see also Hoelker*, 765 F.2d at 1425 (property right involved was right to make business decisions free from threats and coercion); *see, e.g.*, *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989) (abortion center could recover on RICO claim based upon Hobbs Act extortion violation by protestors who used force and threats of force to close the center, regardless of whether the protestors actually succeeded, because the center had a property right to continue to operate its business), *cert. denied*, 493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989).

In this case, Plaintiffs allege that Defendants' threats of force contained in the Deadly Dozen List, "unwanted"-style posters, and similar publications "have decreased the volume of business of plaintiffs or increased their cost of doing business, or both." Compl. ¶¶ 97-99. Moreover, "Defendants' activities also have injured the named plaintiffs * * * by depriving them of the right to engage in a business relationship with actual and prospective patients, to reap the economic advantages of those relationships, and to enter into such relationships free of threats of force." *Id.* ¶ 99. Defendants have allegedly caused Plaintiffs to suffer $50 million in economic damage. *Id.* ¶ 100. I find that these allegations sufficiently identify injury to Plaintiffs' property right to engage in their business without threats of violence, and are sufficient to state an extortion claim under the Hobbs Act.

b. Oregon Coercion Statute: ORS 163.275

Plaintiffs' ORICO claims are based upon the predicate act of coercion which is defined under ORS 163.275 (1995) and set forth in relevant part as follows:

(1) A person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in the other person a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct contrary to the compulsion or inducement, the actor or another will:

(a) Unlawfully cause physical injury to some person; * * *.

The Oregon Supreme Court struck down a former version of the Oregon Coercion Statute, ORS 163.275 (1971), as unconstitutionally overbroad under Article I, section 8, of the Oregon Constitution[26] because that version impermissibly burdened protected speech. *State v. Robertson*, 293 Or. 402, 436, 649 P.2d 569 (1982).[27] Subsequent to *Robertson*, however, the Oregon Legislature redrafted the statute in order to correct its overbreadth. According to the Oregon Court of Appeals, the current, redrafted version of at least ORS 163.275(1)(a) passes constitutional muster provided that the "fear" which is "instilled" in the other person is objectively reasonable, the physical injury that is feared is objectively reasonable, and the "some person" to whom injury is threatened is some specific person. *State v. Stone*, 84 Or. App. 575, 578, 735 P.2d 7 (1987), *rev. denied*, 303 Or. 700, 740 P.2d 1213 (1987).[28]

Plaintiffs do not specify which subsections of the Oregon Coercion Statute that they assert as ORICO predicate

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[26] Article I, section 8, of the Oregon Constitution provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever * * *."

[27] Specifically, the former version was overbroad because it covered "all demands to take or to refrain from nonobligatory action coupled with threats of adverse consequences in case of noncompliance, whether these demands and threats are stated privately or publicly and irrespective of the relationship of the parties themselves or with the public." *Id.* at 436.

[28] The court in *Stone* noted that there is some disagreement as to whether the *Robertson* court declared the whole statute invalid or just subsection 163.275(1)(e), the section under which the defendant in *Robertson* was charged. *Stone*, 84 Or. App. at 575 n.1, 735 P.2d 7. The court did not resolve the disagreement, but rather severed 163.275(1)(a) from the rest of the statute for constitutional scrutiny. Consequently, *Stone*'s holding only expressly applies to ORS 163.275(1)(a). No court has interpreted any other subsection of the statute.

acts. Defendants challenge the constitutionality of all subsections other than § 163.275(1)(a) which was upheld in *Stone*. However, I will not engage in a blanket constitutional inquiry of the Oregon Coercion Statute if Plaintiffs only rely on subsection (1)(a). Therefore, without clear direction, this Court will assume that Plaintiffs only rely on subsection (1)(a). If this assumption is incorrect, Plaintiffs may amend their Complaint to include additional subsections, and Defendants may attack the constitutionality of the other subsections of the Oregon Coercion Statute on which Plaintiffs rely.

Although Plaintiffs do not allege specific facts showing that Defendants actually committed coercion, *see State v. Johnson*, 110 Or. App. 362, 363, 822 P.2d 153 (1991) ("[c]oercion requires proof that the victim was *actually* compelled or induced to abstain from engaging in the conduct in which she had a right to engage or not to engage" (emphasis added)), Plaintiffs may nonetheless pursue claims under ORICO because "racketeering activity" under ORICO includes *attempts* to commit coercion. *See* ORS 166.715(6)(a)(I). Therefore, to prove an ORICO claim, Plaintiffs need only show that Defendants *attempted* to commit coercion, not that Defendants actually violated the Oregon Coercion Statute by coercing Plaintiffs. I find that Plaintiffs have alleged sufficient facts showing that Defendants attempted to coerce Plaintiffs from providing abortions by publishing and disseminating threats of physical harm directed at Plaintiffs.[29]

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[29] For the same reasons, Plaintiffs have also stated a claim under the Oregon Menacing Statute which provides: "(1) A person commits the crime of menacing if by word or conduct the person intentionally attempts to place another person in fear of imminent serious physical injury." ORS 163.190. A violation of the Oregon Menacing Statute may be a predicate act under ORICO. See ORS 166.715(6)(a)(G).

C. Standing to Assert RICO Claims

1. Argument

Third, Defendants contend that even if Plaintiffs properly pleaded extortion and coercion as RICO predicate acts, Plaintiffs do not have standing under RICO because they fail to allege concrete financial loss as a result of the RICO violations. Plaintiffs did not respond to this argument.

2. Analysis

RICO authorizes a private civil action by "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Private litigants have standing under RICO only to the extent that they have been injured in their business or property by the conduct constituting the RICO violation. *Sedima, S.P.R.L. v. Imrex Company*, 473 U.S. 479, 495-96, 105 S.Ct. 3275, 3284-85, 87 L.Ed.2d 346 (1985). "[I]njuries to property are not actionable under RICO unless they result in tangible financial loss to the plaintiff." *Oscar v. University Students Co-op Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992) (diminution in enjoyment of leasehold interest does not constitute a tangible loss to tenant who did not allege any out-of-pocket expenditures as a direct or indirect result of the racketeering activity), *cert. denied*, 506 U.S. 1020, 113 S.Ct. 655, 656, 121 L.Ed.2d 581 (1992); *Steele v. Hospital Corporation of America*, 36 F.3d 69 (9th Cir. 1994) (depletion of insurance funds by excess medical payments does not constitute a financial loss to patients). Likewise, speculative injuries do not confer standing under RICO, unless they become concrete and actual. *Steele*, 36 F.3d at 71 (claim that father of patient "could have used some of those [insurance] benefits for myself" was insufficient where father did not specify an instance where he had to pay a claim out of his own funds because the funds had been exhausted); *Oscar*, 965 F.2d at 787 (claim that plaintiff suffered losses in the reduced rent

she could charge to sublet her apartment was insufficient where plaintiff did not allege that she had a right to sublet her apartment nor that she ever sublet the apartment or attempted to sublet the apartment); *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1311 (9th Cir. 1992) (claim that plaintiff suffered loss of profits was insufficient where it was impossible to determine whether plaintiffs were alleging lost opportunity to realize profits or loss of specific identifiable profits), *cert. denied*, 507 U.S. 1004, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993).

In the present action, Plaintiffs allege that Defendants' racketeering activities are directed at Plaintiffs "to force plaintiffs to forego their right to engage in lawful activity and give up their actual and prospective business relations." Compl. ¶ 97. Plaintiffs further allege that "defendants' racketeering activities have decreased the volume of business of plaintiffs or increased their cost of doing business" and "are calculated to induce clinic personnel to give up their jobs and doctors to forego their economic right to practice medicine" which have injured Plaintiffs in an amount not less than $50 million for each RICO and ORICO claim. *Id.* ¶¶ 99-100.

Although Plaintiffs do not specifically identify how they calculated their damages of at least $50 million, I conclude that Plaintiffs have alleged sufficient facts regarding their concrete financial loss to confer standing, according to *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994). In *Scheidler*, two corporate health care centers alleged RICO claims under § 1964(c), claiming that defendants "conspired to use threatened or actual force, violence or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics." *Id.* at 253, 114 S.Ct. at 801-02. Plaintiffs further alleged that the conspiracy "injured the business and/or property interests of the

petitioner." *Id.* at 253-54, 114 S.Ct. at 802 (internal quotation marks omitted). The Supreme Court held that these allegations stated a claim under RICO for injury to "business or property."[30] *Id.* at 256, 114 S.Ct. at 803. I find that *Scheidler* compels the same result in this case; thus, Plaintiffs have alleged sufficient financial loss to confer standing to assert their RICO claims.[31]

D. RICO Enterprise and Participatory Conduct

1. Arguments

Fourth, Defendants argue that Plaintiffs' allegations do not show that Defendants' alleged RICO enterprise (*i.e.*, ACLA) is distinct from the pattern of racketeering activities of each Defendant, but rather demonstrate that ACLA exists solely to further Individual Defendants' racketeering activities. Moreover, Plaintiffs failed to adequately allege that Individual Defendants participated in the operation and management of the "enterprise."

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[30] In so holding, the Court quoted *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) for the relevant proposition that "'[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Scheidler*, 510 U.S. at 256, 114 S.Ct. at 803.

It is also noteworthy that the plaintiffs in *Scheidler*, like the Plaintiffs in the present action, alleged extortion in violation of the Hobbs Act as one of the RICO predicate acts. *Id.* at 253, 114 S.Ct. at 801.

[31] However, as *Scheidler* states, "[s]tanding represents a jurisdictional requirement which remains open to review at all stages of the litigation." *Id.* at 255, 114 S.Ct. at 802. Therefore, if at any time facts show that any of the Plaintiffs lack sufficient injury to confer standing to assert RICO claims, those claims will be dismissed as to that Plaintiff(s).

Contrary to Defendants' assertions, Plaintiffs argue that they have satisfied the "enterprise" element of RICO by alleging that ACLA exists as a separate entity from the Individual Defendants and is involved in their racketeering activities. In addition, each Individual Defendant violated RICO by participating in the operation and management of the RICO "enterprise," ACLA.

2. Analysis

RICO defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity * * * [or] any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," and is "separate and apart from the pattern of activity in which it engages." *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981)). "Wholly unlawful enterprises fall within RICO's provisions." *Webster v. Omnitrition Intern.*, Inc., 79 F.3d 776, 787 (9th Cir. 1996), petition for cert. filed, 65 U.S.L.W. (U.S. July 16, 1996) (No. 96-82). In addition, for liability to attach to individual defendants, plaintiff must show that the individuals participated in the operation or management of the enterprise which requires that the defendant have "some part in directing the enterprise's affairs" for RICO liability to attach. *Reves v. Ernst & Young*, 507 U.S. 170, 179, 185, 113 S.Ct. 1163, 1170, 1173, 122 L.Ed.2d 525 (1993).

The Ninth Circuit in *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996), recently discussed the minimal requirements to show an enterprise under RICO. A RICO enterprise must exhibit some sort of decision-making structure, and some on-going means of controlling and directing the affairs of the associated group. *Id.* at 1299 (quoting *United States v. Riccobene*, 709 F.2d 214, 222 (3d Cir. 1983), *cert. denied*, 464 U.S. 849, 104 S.Ct. 157, 78 L.Ed.2d 145 (1983)).

However, it "is not necessary to show that the organization 'has some function wholly unrelated to the racketeering activity.'" *Id.* (quoting *Riccobene*, 709 F.2d at 223-24); *see also United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996) ("it would be nonsensical to require proof that an enterprise had purposes or goals separate and apart from the pattern of racketeering activity"). "Rather, it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering." *Id.* (citing *Riccobene*, 709 F.2d at 224). Therefore, the enterprise's only purpose may be to pursue the racketeering activity of its members, but the "enterprise" must not be one and the same as the "pattern of racketeering."[32] *See Chang*, 80 F.3d at 1300 (dismissing RICO claim, in part, because plaintiffs failed to allege "a structure to the organization beyond that which was inherent in the alleged acts of racketeering activity").

In the present action, the "enterprise" element of RICO is easily satisfied because ACLA exists as a distinct legal entity. ACLA is a national organization composed of individuals who allegedly endorse violence and intimidation as a means of furthering their anti-abortion message. Compl. ¶ 17. All the Individual Defendants have been or are affiliated with ACLA, but ACLA's membership extends beyond the Individual Defendants. Compl. ¶¶ 17, 19-32. ACLA holds various conferences which involve ACLA members from around the nation. Compl. ¶¶ 40, 47. ACLA published and disseminated the Deadly Dozen List which contains ACLA's name and address on the bottom of the list. Compl., Ex. A. Moreover, ACLA published numerous other "wanted"-style posters. Based upon these allegations and the logical inferences, Defendants' suggestion that ACLA does

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[32] Contrary to Defendants' assertions, the enterprise need not have an economic motive. *Scheidler*, 510 U.S. 249, 259-62, 114 S.Ct. 798, 805-06.

not exist as an anti-abortion organization separate and distinct from the pattern of racketeering activity is absurd. Accordingly, I find that Plaintiffs have satisfied the "enterprise" element of their RICO claims.

In addition, Plaintiffs' allegations support the conclusion that almost all of the Individual Defendants had some part in the operation and management of ACLA, the RICO enterprise. *See Reves*, 507 U.S. 170, 179, 113 S.Ct. 1163, 1170 ("the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required"). Plaintiffs state that Defendants Burnett, Crane, Dreste, Dodds, Mears, Miller, Murch, Stover, Treshman, and Wysong are, or were, Directors of ACLA during the relevant time period and agreed to publish and disseminate the Deadly Dozen List and other "unwanted"-style posters. (Compl. ¶¶ 20-23, 26-28, 30-32, 96). Furthermore, Defendants ALM, Foreman, McMillian, and Ramey all are members of ACLA and allegedly marketed and distributed ACLA publications and other statements threatening the use of force against plaintiffs. Compl. ¶¶ 18, 24- 25, 29. I find that Plaintiffs sufficiently allege that these Defendants participated in the operation and management of the RICO enterprise.

However, Defendant Bray is not a member of ACLA and has merely "attended ACLA meetings and * * * promoted ACLA's threatening message." Bray's statements promoting ACLA's anti-abortion message do not constitute participation in the "operation and management" of the enterprise. *See, e.g., Webster*, 79 F.3d 776, 789 (defendant's ministerial role in the enterprise and statements promoting the scheme did not constitute participation in the "operation or management" of the enterprise). Therefore, Plaintiffs' RICO and ORICO claims against only Defendant Bray are

dismissed. Plaintiffs have alleged sufficient participation by every other Defendant.

E. RICO Conspiracy

1. Arguments

Lastly, Defendants urge the Court to dismiss Plaintiffs' RICO conspiracy claims because no factual allegations suggest that Individual Defendants conspired and agreed to violate RICO. However, Plaintiffs argue that Defendants are involved in a conspiracy because each Individual Defendant, through their participation in the "enterprise," (*i.e.*, ACLA) allegedly agreed to violate a substantive RICO provision.

2. Analysis

Section 1962(d) of RICO prohibits "any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section." 18 U.S.C. § 1962(d). " 'The essence of a RICO conspiracy is not an agreement to commit racketeering acts, but an *agreement* to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity.'" *United States v. Blinder*, 10 F.3d 1468, 1477 (9th Cir. 1993) (quoting *United States v. Brooklier*, 685 F.2d 1208, 1216 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206, 103 S.Ct. 1194, 1195, 75 L.Ed.2d 439 (1983)). A RICO conspiracy does not require that each co-conspirator knows all of the details of the plan or conspiracy. *Baumer v. Pachl*, 8 F.3d 1341, 1347 (9th Cir. 1993) (dismissed RICO conspiracy claim because no allegations suggested assent to contribute to a common enterprise) (quoting *Brooklier*, 685 F.2d at 1222). Moreover, a co-conspirator need not participate personally in two predicate act offenses. *Blinder*, 10 F.3d at 1477.

Plaintiffs have alleged that "[e]ach defendant agreed with some or all of the other defendants to conduct or

participate in the operation, conduct or management of the affairs of ACLA through a pattern of racketeering activity [and] [e]ach defendant further agreed to the commission of two or more predicate acts through which each defendant--as agent of the other defendants and co-conspirators--would conduct or participate in the operation, conduct or management of ACLA's affairs in violation of 18 U.S.C. § 1962(d)." Compl. ¶ 102. These allegations adequately support Plaintiffs' conspiracy claim. At this stage of the litigation I may not resolve the issue of whether all Defendants, in fact, agreed to participate in the management of the enterprise to commit racketeering activity. *See, e.g., Webster*, 79 F.3d 776, 789 (determining on summary judgment that plaintiff produced no evidence showing that defendants conspired to violate RICO). Plaintiffs have met their initial pleading burden by providing fair notice to Defendants of their RICO conspiracy against Defendants.

In sum, Plaintiffs have alleged sufficient facts to support their RICO and ORICO claims, as well as their RICO and ORICO conspiracy claims. However, Plaintiffs' allegations regarding Defendant Bray's involvement in ACLA, the RICO enterprise, show that he did not "participate" in the operation and management of ACLA; thus, all RICO and ORICO claims against Defendant Bray are DISMISSED.

V. Intentional Infliction Of Emotional Distress

A. Defendants' Arguments

Defendants contend, as a matter of law, that Plaintiffs cannot recover for intentional infliction of emotional distress caused by either the dissemination of true information or Defendants' lawful exercise of constitutionally protected speech. Furthermore, Plaintiffs fail to allege specific facts showing that Defendants directed conduct towards Plaintiffs

which extended beyond the farthest reaches of socially tolerable behavior.

B. Plaintiffs' Arguments

Plaintiffs argue that they may recover on a claim for intentional infliction of emotional distress regardless of whether Defendants are disseminating true information or exercising their constitutional right to free speech. Moreover, whether Defendants' conduct exceeded the bounds of socially tolerable conduct is an issue of fact for the jury.

C. Analysis

To state a claim for intentional infliction of emotional distress, Plaintiffs must allege the following:

(1) defendant intended to inflict severe emotional distress on the plaintiff,

(2) the defendant's acts were the cause of the plaintiffs severe emotional distress, and

(3) the defendant's acts constitute an extraordinary transgression of the bounds of socially tolerable conduct.

Madani v. Kendall Ford, Inc., 312 Or. 198, 203, 818 P.2d 930 (1991) (citation omitted) (court dismissed plaintiff's claim for intentional infliction of emotional distress where employer fired plaintiff for refusing to pull down his pants at employer's request). The "intent" element of the tort is satisfied where "'the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct.'" *McGanty v. Staudenraus*, 321 Or. 532, 550, 901 P.2d 841 (1995) (reversed the trial court's dismissal of plaintiff's claim for intentional infliction of emotional distress based on defendant's course of conduct constituting sexual harassment,

such as unwelcome sexual advances, comments, and physical conduct directed towards plaintiff) (quoting comment i of the Restatement (Second) of Torts § 46 (1965)).

In considering whether the defendant's acts were an extraordinary transgression of the bounds of socially tolerable behavior, the key focus is "on the purpose and the means used to achieve it." *Patton v. J.C. Penney Co.*, 301 Or. 117, 123, 719 P.2d 854 (1986) (court dismissed employee's complaint alleging that employer intentionally inflicted emotional distress by discharging the employee because he was socializing with a co-worker). The conduct must be deliberate and the means of inflicting the harm must be extraordinary:

> [t]he additional requirement that defendant's means of inflicting the injury must have been extraordinary is explained as necessary, first, to distinguish actionable conduct from insults, ill temper, and offensive jokes that persons are expected to endure under contemporary standards of behavior, and second, to provide a setting of objective reality for a claim of harm that otherwise rests only on evidence of the plaintiff's subjective reaction divorced from physiological or other tangible injury.

Id. at 123, 719 P.2d 854 (quoting *Brewer v. Erwin*, 287 Or. 435, 457, 600 P.2d 398 (1979) (submitted issue of outrageousness to the jury where defendant attempted to frighten or bully plaintiff out of her apartment by particularly obnoxious means: disconnecting utilities, using physical violence and threats of violence, and demolishing the building under her feet). "The tort does not provide recovery for the kind of temporary annoyance or injured feelings that result from friction and rudeness among people in day-to-day life." *Shay v. Paulson*, 131 Or. App. 270, 884 P.2d 870 (1994) (court dismissed complaint alleging that defendant

intentionally inflicted emotional distress by forging plaintiff's name on magazine order forms).

Moreover, the court will only consider acts which have occurred within two years from the date the complaint was filed.[33] *Richer v. Poisson*, 137 Or. App. 157, 160-61, 903 P.2d 932 (1995) (concluding that plaintiffs stated a claim for intentional infliction of emotional distress by alleging that, defendant, for the purpose of causing plaintiffs' emotional distress, painted graffiti on their windows, harassed them by telephone and harassed their customers by making obscene gestures) (citing ORS 12.110(1)).

In the present action, Plaintiffs allege that Defendants published and disseminated posters, which threatened physical harm to Plaintiffs, with specific intent to inflict severe mental and emotional distress upon plaintiffs. Compl. ¶ 119. Furthermore, the dissemination of these threatening posters exceeds the bounds of socially tolerable conduct and has caused Plaintiffs to suffer severe mental and emotional distress. Compl. ¶¶ 120-21. The Complaint also contains significant background regarding the potential violent effect of Defendants' posters, such as murder, attempted murder, and assault of the individuals targeted in the posters. Compl. ¶¶ 50- 80. Based upon these allegations, I cannot hold as a matter of law that Defendants' alleged threatening conduct does not exceed the bounds of socially tolerable conduct.

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[33] As stated above, the Court interpreted the Complaint as attacking only the Deadly Dozen List and the Crist poster, with all other expressions providing factual context. Both the Deadly Dozen List and the Crist poster occurred within 2 years from October 26, 1995, the date this action was filed. Other "wanted"-style posters were disseminated more than two years before the filing of the Complaint but may be relevant to provide context to the potentially actionable threats.

Accordingly, Plaintiffs have stated a claim for intentional infliction of emotional distress.[34]

VI. Punitive Damages

As Defendants correctly state, Article I, section 8, of the Oregon Constitution prohibits punitive damages for injuries resulting from an abuse of protected expression. *Huffman*, 317 Or. at 457, 857 P.2d 101 (punitive damages were properly awarded for trespassing which was non-expressive conduct); *Lewis v. Oregon Beauty Supply Co.*, 302 Or. 616, 629, 733 P.2d 430 (1987) (on a claim for intentional infliction of emotional distress, the court allowed punitive damages for the non-communicable conduct but prohibited punitives for the communicable conduct); *Hall v. May Dept. Stores*, 292 Or. 131, 146-47, 637 P.2d 126 (1981) (court held that plaintiff could not receive punitive damages on claim for intentional infliction of emotional distress where the tortious conduct (*i.e.*, falsely accusing plaintiff of stealing and oppressively interrogating her) consisted only of

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[34] In so holding, I reject Defendants' suggestion that they cannot be held liable for the tortious effects of their expression, absent a specific privilege, merely because they are exercising their constitutional right to speech. If Defendants' assertions were true, a victim of defamation could never sue the perpetrator because the offense necessarily involves the exercise of one's right to speech. *See Huffman and Wright Logging Co. v. Wade*, 317 Or. 445, 453, 857 P.2d 101 (1993) ("The content of speech or writing is an element of the tort of defamation;" thus, only compensatory and not punitive damages may be awarded). Moreover, the truthfulness or falsity of the content of Defendants' expressive conduct is irrelevant with regard to the tort of intentional infliction of emotional distress. Rather, the expressive conduct need only be outrageous in the extreme, regardless of whether the content of the communications is true or false. *Id.* at 455, 857 P.2d 101 ("The content of speech is not an element of the tort[ ] * * * of intentional infliction of emotional distress * * *." Rather, the tort of intentional infliction of emotional distress focuses on the "forbidden effects but expressly prohibit[s] expression to achieve those effects").

expression). Conversely, the Oregon Constitution does not bar recovery of punitive damages or criminal liability for unprotected expression. *See, e.g., State v. Moyle*, 299 Or. 691, 699-704, 705 P.2d 740 (1985) (noting the similarity between criminal liability and punitive damages, and holding that criminal harassment statute did not violate Article I, Section 8, because it prohibited threats to cause serious injury to that person); *see also Stone*, 84 Or. App. at 578, 735 P.2d 7 ("a demand coupled with a threat of unlawful injury to specific persons or property enjoys no constitutional protection if it is objectively believable that the threat will be carried out if the demand is not complied with").[35]

Oregon law is not entirely clear as to whether Plaintiffs may receive punitive damages for injuries caused by Defendants' alleged conduct in this case. However, if the facts demonstrate that Defendants' expression does not constitute a threat of serious physical harm toward Plaintiffs, that expression may be protected under Article I, Section 8, of the Oregon Constitution, as well as the First Amendment of the United States Constitution. In that event, punitive damages for intentional infliction of emotional distress caused by Defendants' expression would be barred.[36] However, because Plaintiffs allege that Defendants' expression constitutes threats of serious physical harm towards Plaintiffs,

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[35] Likewise, as extensively discussed above, the First Amendment to the United States Constitution also does not protect "true threats" of serious physical harm. *See* discussion in Part II.C. of this Opinion.

[36] As to the other causes of action, if the facts show that Defendants' expressions are not "true threats," most of Plaintiffs' federal and state claims would likely extinguish and this issue would become moot.

Plaintiffs may allege punitive damages for all claims.[37] I decline to reach a decision on this matter at this juncture.

CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss Plaintiffs' Complaint (#103, #104, #112) are DENIED. Defendant ACLA's Motion for Judgment on the Pleadings (#114) is DENIED IN PART and GRANTED IN PART as follows: All RICO and ORICO claims against Defendant Bray are DISMISSED.[38]

Plaintiffs are given LEAVE TO AMEND their Complaint to clearly distinguish between the allegedly actionable and the contextual expressions, as well as to specifically name the individual Defendants who intended to further the alleged threats of violence.

IT IS SO ORDERED[39]

September 18, 1996

ROBERT E. JONES
U.S. District Judge

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[37] Plaintiffs may seek punitive damages on all other claims, so long as the damages are awarded for violation of the statute, and not for the content of the speech.

[38] The inclusion of factual matters outside the pleadings ordinarily requires Rule 12 motions to be treated as a Rule 56 motion for summary judgment, *see* Fed. R. Civ. P. 12(b); *see also* William W. Schwarzer, A. Wallace Tashima, James M. Wagstaffe, Federal Civil Procedure Before Trial, § 9:198 (1996), but at least some discovery must be completed before a motion for summary judgment should even be considered in this case. *See* Fed. R. Civ. P. 56(f).

[39] I emphasize that this decision is made in a FRCP 12(b)(6) setting where all allegations in the Complaint must be accepted as true. The Court will be reevaluating Plaintiffs' claims with great scrutiny after further discovery has been undertaken and the case is ripe for summary judgment.

APPENDIX B

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; et al., Plaintiffs,
v.
AMERICAN COALITION OF LIFE ACTIVISTS; et al., Defendants.

Feb. 25, 1999

ORDER AND PERMANENT INJUNCTION

JONES, District J.

Plaintiffs, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center, doing business as All Women's Health Services (collectively "plaintiffs"), commenced this action seeking a permanent injunction, damages and other relief. The trial before the jury having been concluded, and the jury having found that defendants did issue true threats against plaintiffs, and this Court having found that plaintiffs are without an adequate remedy at law, the Court makes the following findings:

1. The "Deadly Dozen" Poster (Trial Exhibit 1) is a true threat to bodily harm, assault or kill one or more of the plaintiffs.

2. The Poster of Dr. Robert Crist (Trial Exhibit 5) is a true threat to bodily harm, assault or kill one or more of the plaintiffs.

3. The "Nuremberg Files" (Trial Exhibits 7, 9) are a true threat to bodily harm, assault or kill one or more of the plaintiffs.

4. As a result of the defendants' issuance of these threats, plaintiffs have undertaken a variety of security measures in order to ensure their safety.

5. Based upon the evidence admitted at trial, the Court finds that plaintiffs remain threatened by the defendants' threats, and thus have no adequate remedy at law.

I conclude from my independent review of the evidence produced at trial that plaintiffs have proven by clear and convincing evidence that each defendant, acting independently and as a co-conspirator, prepared, published and disseminated the "Deadly Dozen" Poster, the Poster of Dr. Robert Crist and the "Nuremberg Files" with specific intent and malice in a blatant and illegal communication of true threats to kill, assault or do bodily harm to each of the plaintiffs and with the specific intent to interfere with or intimidate the plaintiffs from engaging in legal medical practices and procedures.[1]

I totally reject the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from engaging in providing abortion services.

The law requires a higher level of scrutiny and proof for an injunction involving speech than for an award of damages for violation of a statute. *See Madsen v. Women's Health Center*, 512 U.S. 753 (1994). I find the actions of the defendants in preparing, publishing and disseminating these true threats

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[1] The term "threaten" used herein incorporates this definition.

objectively and subjectively[2] were not protected speech under the First Amendment. Therefore, the Court issues the following permanent injunction against each defendant, their agents and those in active concert or participation with them, and specifically against Paul DeParrie, an employee and agent of defendant Advocates for Life Ministries, who conspired with Neal Horsley of Carrollton, Georgia, to provide the specific information for the Nuremberg Files and who thereafter obstructed justice by destroying or assisting in concealing the materials he provided to Horsley to convert into true threats on his web site.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

PERMANENT INJUNCTION

1. Under the equitable powers of this Court and the Court's authority granted under the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248, defendants AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, MICHAEL DODDS, TIMOTHY PAUL DRESTE, JOSEPH L. FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, DONALD TRESHMAN and CHARLES WYSONG (collectively "defendants"), and their agents and all persons in active concert or participation with any of them who receive actual notice of

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[2] For purposes of this Order and Preliminary Injunction, I consider a person to make a "true threat" when the person makes a statement that, in context, a reasonable listener would interpret as communicating a serious expression of an intent to inflict or cause serious harm on or to the listener (objective); and the speaker intended that the statement be taken as a threat that would serve to place the listener in fear for his or her personal safety, regardless of whether the speaker actually intended to carry out the threat (subjective).

this Order and Permanent Injunction or the "Notice" attached as Exhibit A to this Order, are hereby immediately and permanently ENJOINED and RESTRAINED from committing any of the following acts or aiding, abetting, directing or facilitating others to commit or conspiring with any others to commit the following acts:

(a) Threatening, with the specific intent to do so, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, in violation of the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248;

(b) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the "Deadly Dozen" Poster, which is Trial Exhibit 1, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys;

(c) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the Poster of Dr. Robert Crist, which is Trial Exhibit 5, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients or attorneys;

(d) Providing additional material concerning Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, with a specific intent to threaten, to the Nuremberg Files or any mirror web site[3] that may be created. In addition, defendants are enjoined from publishing, republishing, reproducing and/or distributing in print or electronic form the personally identifying information about plaintiffs contained in Trial Exhibits 7 and 9 (the Nuremberg Files) with a specific intent to threaten.

2. Defendants and their agents and all individuals in active concert or participation with any of them who receive actual notice of this Order and Permanent Injunction or the attached "Notice" shall promptly submit to the custody of the Court all materials in their possession, custody or control that are not in compliance with the provisions of this Permanent Injunction, except that counsel for the defendants may retain one copy of any such materials that were included in the Record of this Court.

3. Willful violation of this Order and Permanent Injunction or any other of this Court's orders may subject any person who commits such an act to criminal and/or civil prosecution for contempt of this Court. Any violation of this Order and Permanent Injunction will result in immediate issuance of an order to show cause for service on the violator, who after appropriate hearings and findings, will be dealt with within the sanctions provided by law.

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[3] A "mirror web site" within the meaning of this Order means a webs site created by an independent party who takes the content from the web site and reproduces it on his or her own computer ("the web server") and locates it at a different Internet address.

4. Defendants, and their agents and all persons in active concert or participation with any of them, are hereby ENJOINED and RESTRAINED from disposing of, secreting, pledging, encumbering, conveying, transferring, damaging, mortgaging, or otherwise disposing or removing from its customary location or in any other way making unavailable to the processes of the court, any of their real property or personal property, including, but not limited to, cash, bank accounts, retirement plans, bonds, and other securities, liquid assets and personal property regardless of whether the property is held jointly with another person or individually by the defendant.

5. This Court shall retain jurisdiction of this action for all purposes, including without limitation, all proceedings involving the interpretation, enforcement or amendment of this Order and Permanent Injunction.

February 25, 1999

ROBERT E. JONES
U.S. District Judge

EXHIBIT A
NOTICE OF ORDER OF PERMANENT INJUNCTION

The United States District Court for the District of Oregon in the above-captioned case has ordered that Defendants AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, MICHAEL DODDS, TIMOTHY PAUL DRESTE, JOSEPH L. FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, DONALD TRESHMAN and CHARLES WYSONG (collectively "defendants"), and their agents and all persons in active concert or participation with any of them who receive actual notice of the Order and Permanent Injunction or this Notice are hereby immediately and permanently ENJOINED and RESTRAINED from committing any of the following acts or aiding, abetting, directing or facilitating others to commit or conspiring with any others to commit the following acts:

(a) Threatening, with the specific intent to do so, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, in violation of the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248;

(b) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the "Deadly Dozen" Poster, which is Trial Exhibit 1, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services,

or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys;

(c) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the Poster of Dr. Robert Crist, which is Trial Exhibit 5, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients or attorneys;

(d) Providing additional material concerning Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, with a specific intent to threaten, to the Nuremberg Files or any mirror web site[1] that may be created. In addition, defendants are enjoined from publishing, republishing, reproducing and/or distributing in print or electronic form the personally identifying information about plaintiffs contained in Trial Exhibits 7 and 9 (the Nuremberg Files) with a specific intent to threaten.

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[1] A "mirror web site" within the meaning of this Order means a web site created by an independent party who takes the content from a web site and reproduces it on his or her own computer ("the web server") and locates it at a different Internet address.

YOU ARE HEREBY DIRECTED TO CONFORM YOUR CONDUCT TO THE REQUIREMENTS OF THIS ORDER. IF YOU DO NOT, YOU MAY BE ORDERED TO SHOW CAUSE WHY YOU SHOULD NOT BE IMMEDIATELY ARRESTED. YOU MAY ALSO HAVE TO PAY A CIVIL CONTEMPT FINE OF UP TO $1,000.00 PER DAY UNTIL YOU COMPLY WITH THIS ORDER OR BE SUBJECT TO OTHER SANCTIONS AS PROVIDED BY LAW.

APPENDIX C

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE
COLUMBIA/WILLAMETTE, INC.; ET AL.,
Plaintiffs,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ET AL.,
Defendants.

SELECTED FINAL JURY INSTRUCTIONS

January 26, 1999

Now, as to the First Amendment, instruction number eight. The First Amendment permits persons to join with others to express a particular viewpoint. Speech is protected, if the speech — even if the speech is insulting, outrageous, or even offensive. There is no — this is so even if the speech is uninvited and unwelcome by the person to whom it is directed or to others within earshot.

Even speech that is coercive may be protected if the speaker refrains from violence or from making a true threat. Moreover, the mere abstract teaching of the moral propriety or even moral necessity for resort to force and violence is protected speech under the First Amendment. However, true threats are not protected by the First Amendment.

Now, instruction number nine. As I have explained to you, in the course of this trial, there is no claim, in this case, that

any of the three statements, that have been listed to you — listed for you, is an incitement to violence by persons other than the defendants.

What is incitement? Incitement is speech which must be intended to produce and is likely to produce imminent violence or a violation of law through the actions of persons other than the speaker. Imminent means following closely in time.

There is no claim, in this case, that the three statements, I have listed for you, have produced imminent violence against plaintiffs. Plaintiffs claim only that these three statements are threats of force, true threats, not that the statements have caused anyone or will cause anyone, in the future, to use force against plaintiffs.

You are not to consider any evidence that the three statements allegedly incite violence against plaintiff. You are to consider only that the statements are true threats — only whether the statements are true threats, as I will now define that term for you.

APPENDIX D

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE
COLUMBIA/WILLAMETTE, INC., ET AL.,
Plaintiffs,

v.

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Defendants.

VERDICT

1. Is the "Deadly Dozen" poster a true threat by one or more of the defendants to bodily harm, assault, or kill any of the plaintiffs?

✓	
YES	NO

2. Is the Crist poster a true threat by one or more of the defendants to bodily harm, assault, or kill any of the plaintiffs?

✓	
YES	NO

3. Are the Nuremberg files a true threat by one or more of the defendants to bodily harm, assault or kill any of the plaintiffs?

✓	
YES	NO

If you answered "yes" to any of the above, please proceed to the next section. Otherwise, please put the presiding juror's number on the signature line, date this form, and notify the courtroom deputy that you have reached a verdict.

AMERICAN COALITION OF LIFE ACTIVISTS ("ACLA")

1. Did the American Coalition of Life Activists ("ACLA") violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for ACLA's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$2.25 million
Dr. Warren Hern	$ 14,429.00	$1.5 million
Dr. Elizabeth Newhall	$ 15,797.98	$2 million
Dr. James Newhall	$ 375.00	$2 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$6 million
Portland Feminist Women's Health Center	$ 50,243.30	$3 million

ADVOCATES FOR LIFE MINISTRIES ("ALM")

1. Did Advocates for Life Ministries ("ALM") violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for ALM's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$2.25 million
Dr. Warren Hern	$ 14,429.00	$1.5 million
Dr. Elizabeth Newhall	$ 15,797.98	$2 million
Dr. James Newhall	$ 375.00	$2 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$6 million
Portland Feminist Women's Health Center	$ 50,243.30	$3 million

3. Did ALM violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for ALM's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

MICHAEL BRAY

1. Did Michael Bray violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Michael Bray's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$1 million
Dr. Warren Hern	$ 14,429.00	$1 million
Dr. Elizabeth Newhall	$ 15,797.98	$1 million
Dr. James Newhall	$ 375.00	$1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$2 million
Portland Feminist Women's Health Center	$ 50,243.30	$2 million

3. Did Michael Bray violate or conspire to violate RICO?

☐ Yes ☒ No

4. If you answered "yes" to Question #3, what damages do you award for Michael Bray's violation(s) of RICO?

Dr. Robert Crist $_____

Dr. Warren Hern $_____

Dr. Elizabeth Newhall $_____

Dr. James Newhall $_____

Planned Parenthood of the Columbia/Willamette, Inc. $_____

Portland Feminist Women's Health Center $_____

ANDREW BURNETT

1. Did Andrew Burnett violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Andrew Burnett's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$1 million
Dr. Warren Hern	$ 14,429.00	$1 million
Dr. Elizabeth Newhall	$ 15,797.98	$1 million
Dr. James Newhall	$ 375.00	$1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$2 million
Portland Feminist Women's Health Center	$ 50,243.30	$2 million

3. Did Andrew Burnett violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Andrew Burnett's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

DAVID CRANE

1. Did David Crane violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for David Crane's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$1 million
Dr. Warren Hern	$ 14,429.00	$1 million
Dr. Elizabeth Newhall	$ 15,797.98	$1 million
Dr. James Newhall	$ 375.00	$1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$2 million
Portland Feminist Women's Health Center	$ 50,243.30	$2 million

3. Did David Crane violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for David Crane's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

MICHAEL DODDS

1. Did Michael Dodds violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Michael Dodds' violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$750,000.00
Dr. Warren Hern	$ 14,429.00	$750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$750,000.00
Dr. James Newhall	$ 375.00	$750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$1 million
Portland Feminist Women's Health Center	$ 50,243.30	$1 million

3. Did Michael Dodds violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Michael Dodds' violation(s) of RICO?

Dr. Robert Crist	$ 29,742.00
Dr. Warren Hern	$ 10,822.00
Dr. Elizabeth Newhall	$ 11,848.00
Dr. James Newhall	$ 281.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 304,376.00
Portland Feminist Women's Health Center	$ 37,682.00

TIMOTHY DRESTE

1. Did Timothy Dreste violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Timothy Dreste's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$750,000.00
Dr. Warren Hern	$ 14,429.00	$750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$750,000.00
Dr. James Newhall	$ 375.00	$750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$1 million
Portland Feminist Women's Health Center	$ 50,243.30	$1 million

3. Did Timothy Dreste violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Timothy Dreste's violation(s) of RICO?

Dr. Robert Crist	$ 19,828.00
Dr. Warren Hern	$ 7,215.00
Dr. Elizabeth Newhall	$ 7,899.00
Dr. James Newhall	$ 188.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 202,917.00
Portland Feminist Women's Health Center	$ 25,121.00

JOSEPH FOREMAN

1. Did Joseph Foreman violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Joseph Foreman's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$750,000.00
Dr. Warren Hern	$ 14,429.00	$750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$750,000.00
Dr. James Newhall	$ 375.00	$750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$1 million
Portland Feminist Women's Health Center	$ 50,243.30	$1 million

3. Did Joseph Foreman violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Joseph Foreman's violation(s) of RICO?

Dr. Robert Crist	$ 9,914.00
Dr. Warren Hern	$ 3,607.00
Dr. Elizabeth Newhall	$ 3,950.00
Dr. James Newhall	$ 94.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 101,459.00
Portland Feminist Women's Health Center	$ 12,561.00

C. ROY MCMILLAN

1. Did C. Roy McMillan violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for C. Roy McMillan's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$1 million
Dr. Warren Hern	$ 14,429.00	$1 million
Dr. Elizabeth Newhall	$ 15,797.98	$1 million
Dr. James Newhall	$ 375.00	$1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$2 million
Portland Feminist Women's Health Center	$ 50,243.30	$2 million

3. Did C. Roy McMillan violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for C. Roy McMillan's violation(s) of RICO?

Dr. Robert Crist	$ 29,742.00
Dr. Warren Hern	$ 10,822.00
Dr. Elizabeth Newhall	$ 11,848.00
Dr. James Newhall	$ 281.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 304,376.00
Portland Feminist Women's Health Center	$ 37,682.00

BRUCE MURCH

1. Did Bruce Murch violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Bruce Murch's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$750,000.00
Dr. Warren Hern	$ 14,429.00	$750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$750,000.00
Dr. James Newhall	$ 375.00	$750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$1 million
Portland Feminist Women's Health Center	$ 50,243.30	$1 million

3. Did Bruce Murch violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Bruce Murch's violation(s) of RICO?

Dr. Robert Crist	$ 19,828.00
Dr. Warren Hern	$ 7,215.00
Dr. Elizabeth Newhall	$ 7,899.00
Dr. James Newhall	$ 188.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 202,917.00
Portland Feminist Women's Health Center	$ 25,121.00

CATHERINE RAMEY

1. Did Catherine Ramey violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Catherine Ramey's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$500,000.00
Dr. Warren Hern	$ 14,429.00	$500,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$500,000.00
Dr. James Newhall	$ 375.00	$500,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$750,000.00
Portland Feminist Women's Health Center	$ 50,243.30	$750,000.00

3. Did Catherine Ramey violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Catherine Ramey's violation(s) of RICO?

Dr. Robert Crist	$ 19,828.00
Dr. Warren Hern	$ 7,215.00
Dr. Elizabeth Newhall	$ 7,899.00
Dr. James Newhall	$ 188.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 202,917.00
Portland Feminist Women's Health Center	$ 25,121.00

DAWN STOVER

1. Did Dawn Stover violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Dawn Stover's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$500,000.00
Dr. Warren Hern	$ 14,429.00	$500,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$500,000.00
Dr. James Newhall	$ 375.00	$500,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$750,000.00
Portland Feminist Women's Health Center	$ 50,243.30	$750,000.00

3. Did Dawn Stover violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Dawn Stover's violation(s) of RICO?

Dr. Robert Crist	$ 9,914.00
Dr. Warren Hern	$ 3,607.00
Dr. Elizabeth Newhall	$ 3,950.00
Dr. James Newhall	$ 94.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 101,459.00
Portland Feminist Women's Health Center	$ 12,561.00

DONALD TRESHMAN

1. Did Donald Treshman violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Donald Treshman's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$1 million
Dr. Warren Hern	$ 14,429.00	$1 million
Dr. Elizabeth Newhall	$ 15,797.98	$1 million
Dr. James Newhall	$ 375.00	$1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$2 million
Portland Feminist Women's Health Center	$ 50,243.30	$2 million

3. Did Donald Treshman violate or conspire to violate RICO?

☐ Yes ☒ No

4. If you answered "yes" to Question #3, what damages do you award for Donald Treshman's violation(s) of RICO?

Dr. Robert Crist	$ _____
Dr. Warren Hern	$ _____
Dr. Elizabeth Newhall	$ _____
Dr. James Newhall	$ _____
Planned Parenthood of the Columbia/Willamette, Inc.	$ _____
Portland Feminist Women's Health Center	$ _____

CHARLES WYSONG

1. Did Charles Wysong violate or conspire to violate FACE?

☒ Yes ☐ No

2. If you answered "yes" to Question #1, what damages do you award for Charles Wysong's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$1 million
Dr. Warren Hern	$ 14,429.00	$1 million
Dr. Elizabeth Newhall	$ 15,797.98	$1 million
Dr. James Newhall	$ 375.00	$1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$2 million
Portland Feminist Women's Health Center	$ 50,243.30	$2 million

3. Did Charles Wysong violate or conspire to violate RICO?

☒ Yes ☐ No

4. If you answered "yes" to Question #3, what damages do you award for Charles Wysong's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

The foregoing is the unanimous verdict of this Jury in the matter of *Planned Parenthood, et al. v. American Coalition, et al.*, Civil No. 95-1671-JO.

DATED this 2nd day of February, 1999.

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PRESIDING JUROR NO.

Supreme Court U.S.
FILED
NOV 12 2002
OFFICE OF THE CLERK

(3)

No. 02-563

IN THE

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, *ET AL.*,
Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF OF THE AMERICAN FAMILY ASSOCIATION CENTER FOR LAW AND POLICY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

The American Family Association Center for Law and Policy (AFA-CLP) is the legal arm of the American Family Association. AFA-CLP litigates vigorously in defense of the free speech rights of those who stand up for life and family. *E.g.*, *United States v. Vazquez*, 145 F.3d 74 (2d Cir. 1998) (successful defense of pro-life sidewalk counselor against FACE charge): *Clear Channel Broadcasting, Inc. v. Florida Family Ass'n, Inc.*, No. CIO-01-1085 (Fla. Circ. Ct. filed Feb. 6, 2001) (current defense of anti-pornography activists against RICO suit).

The AFA-CLP is deeply concerned at the horrendously anti-speech precedent set by the en banc Ninth Circuit in this case. AFA-CLP files this brief urging Supreme Court review.[1]

SUMMARY OF ARGUMENT

This is a textbook free speech case. The provocative posters and website at issue contain classic political speech and fall into no recognized exception to the First Amendment. The controversial nature of the speech in question makes the protections of the First Amendment especially important here. The Ninth Circuit's "poster pattern" theory of liability is unprecedented, unwarranted, unworkable, and unprincipled. This Court should therefore grant review.

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[1]No counsel for a party authored this brief in whole or in part. No person or entity aside from the AFA-CLP, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

The AFA-CLP is a division of the American Family Association (AFA). The AFA has no parent corporation and no stock.

In the alternative, this Court should summarily reverse or vacate the Ninth Circuit's judgment. The Ninth Circuit's novel rationale for affirmance is not only legally indefensible, it is also inadequate to sustain judgment here, where the jury was not limited to the theory of liability subsequently embraced on appeal. Remand is also warranted in light of the following: (1) respondent's theory of Hobbs Act extortion (the sole RICO predicate here) mirrors the faulty Hobbs Act "extortion" theory this Court is reviewing in *Scheidler v. NOW*, No. 01-1118 (to be argued Dec. 4, 2002), and thus may merit dismissal in light of the forthcoming *Scheidler* decision; (2) respondents lack RICO standing because personal injuries (like threats of personal harm) are not injuries to "business or property" as required under RICO, 18 U.S.C. § 1964(c); and (3) respondents went to the jury on a nonexistent (and thus jurisdictionally inadequate) FACE "conspiracy" claim, a defect that fatally infects the unitary FACE liability verdict here.

ARGUMENT

This is a classic, textbook free speech case. The provocative posters and website at issue fall into no recognized exception to the protections of the First Amendment. Respondents did not even contend that liability should rest on the claim that the speech in question constituted "fighting words," or obscenity, or defamation, or unlawful incitement. While respondents did go to the jury on the claim that the speech was a "threat," *see* Pet. App. 249a-253a, the en banc Ninth Circuit correctly acknowledged that the posters and website contained no threatening language. Pet. App. 7a, 39a. *See* Pet. App. 10a-12a (recounting speech in question). The First Amendment therefore requires judgment for petitioners.

The Ninth Circuit, by a 6-5 vote, sought to evade this result by

the unveiling of a new exception to the First Amendment: "format" liability. This unprecedented -- and theoretically unlimited -- exception strikes at the very heart of the First Amendment. This Court should grant review because of the grave importance of the questions presented.

I. THE FIRST AMENDMENT IS MOST NECESSARY WHEN THE SPEECH IS MOST CONTROVERSIAL.

Speech that is popular or pleasant has little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451, 462 n.11 (1987). The true test of the right to free speech, under the First Amendment to the United States Constitution, is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing, or even despised. *E.g.*, *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning).

Accordingly, this Court has insisted in case after case that the right to free speech embraces "vehement, caustic, and sometimes unpleasantly sharp attacks" upon the views or conduct of others, *New York Times, Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and that the First Amendment protects even such "deeply offensive" speech as "virulent ethnic and religious epithets, *see Terminello v. Chicago*, 337 U.S. 1 (1949), vulgar repudiations of the draft, *see Cohen v. California*, 403 U.S. 15 (1971), and scurrilous caricatures, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)." *Eichman*, 496 U.S. at 318-19. *Accord Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774 (1994) ("insulting, and even outrageous, speech") (internal quotation marks and citations omitted).

The premise of the Ninth Circuit's holding is that petitioners should have known that the *format* of their two "GUILTY" posters would scare the petitioners. But where the communication itself contains no threats, there is no "scary

speech" exception to the First Amendment. If there were, the decisions in *Terminello* and numerous other precedents of this Court would have to be overruled. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Watts v. United States*, 394 U.S. 705 (1969) (per curiam); *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

The Ninth Circuit's *ratio decidendi* is thus completely foreign to this Court's First Amendment jurisprudence. But that is not all.

The Ninth Circuit's theory is also facially absurd -- "Wanted" posters have a lengthy history in law enforcement, satire, political rhetoric, and Old West lore, and their format has never been deemed an unlawful "threat."

Moreover, the Ninth Circuit's theory is facially vague. What is a "Wanted-*type*" poster? And how close in time or frequency must the coincidence be between the utterance or publication of the speech (by third parties) and the commission of unlawful acts (by still other third parties) in order to generate a "poster pattern," or other "scary speech" connection, that delegitimizes otherwise pristine First Amendment activity? How long does the delegitimization last? And to whom does it apply -- all speakers, or just those with certain political viewpoints? If the Ninth Circuit's standard of liability were embodied in a statute, that statute would be struck down for vagueness and overbreadth at its first appearance in court.

This Court should grant review.

II. THIS CASE MERITS SUMMARY REVERSAL.

In the alternative, this Court should summarily reverse the judgment of the Ninth Circuit. This disposition would be

appropriate for several reasons.

First, the Ninth Circuit's outlandish theory of threats liability is patently indefensible.

Second, even if the Ninth Circuit were correct in its analysis, the judgment would have to be vacated for the simple reason that the jury *was not limited to the Ninth Circuit's theory of the case*. *See* Pet. at 25-26. Thus, the jury may have *rejected* the "poster pattern" (the theory the Ninth Circuit endorsed) because of the tenuousness of supporting evidence, and instead embraced the argument that the *words* of the poster were threatening (the theory the Ninth Circuit rejected). *See* Pet. App. 251a-253a (instructing jury to determine whether petitioners' "statements" were threats). Such circumstances necessitate at least a retrial. *Griffin v. United States*, 502 U.S. 46, 53-56, 59 (1991).

Vacation and remand to the district court would have the salutary effect of promptly erasing the Ninth Circuit's pernicious decision. And while an outright reversal would be preferable to a retrial, vacation and remand could ultimately have a comparable effect, at least in part, for the reasons set forth below.

A. Defective Theory of Hobbs Act Extortion.

The RICO claim may need to be dismissed in light of this Court's forthcoming decision in *Scheidler v. NOW*, No. 01-1118 (consolidated with *OR v. NOW*, No. 01-1119) (to be argued Dec. 4, 2002).

In the present case, respondents' theory of Hobbs Act "extortion" -- the sole predicate offense for the RICO claim, Final Jury Instructions p. 29 -- suffers from the same defects as the Hobbs Act "extortion" claim this Court is reviewing in *Scheidler*. *See* Pet. App. 257a. Namely, there was no requirement that the jury find the element of "obtaining of

property." *See* Final Jury Instructions pp. 9 ("Plaintiffs claim that [the alleged threats were] made in an unlawful attempt to prevent the plaintiff from continuing to provide abortions"), 24 (RICO enterprise allegedly had "purpose . . . to drive [abortion providers] out of business"), 30 ("extortion" means threat designed "to deprive a plaintiff of his or her property"), 32 ("Property" includes "right to provide abortion services free from wrongful threats, violence, coercion, or fear" and "may also include money plaintiffs contend they were required to spend on security measures"), 33 (extortionate "intent" means "intent of depriving a plaintiff of his or her property or protected right to provide abortion services"), 34 ("deprive . . . of property or protected rights"), 35 (same).

Should this Court reverse in *Scheidler*, respondents' extortion predicates should also merit dismissal, thereby terminating the RICO claim.

B. Absence of RICO Standing.

The RICO claim must also fail for want of RICO standing. (This is grounds for immediate summary reversal.)

RICO only confers standing on a private party "injured in his *business or property* by reason of a violation of section 1962," 18 U.S.C. § 1964(c).

This Court has interpreted the RICO injury requirement as follows:

> [A] plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496-97 (1985). As this Court explained in construing an identical

phrase in the federal antitrust statute, "The phrase 'business or property' . . . retains restrictive significance. It would, for example, exclude personal injuries suffered." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). As one court explained in a RICO case,

> had Congress intended to create a federal treble damages remedy for cases involving bodily injury, injury to reputation, mental or emotional anguish, or the like, all of which will cause some financial loss, it could have enacted a statute referring to injury generally, without any restrictive language.

Grogan v. Platt, 835 F.2d 844, 847 (11th Cir.) (internal quotation marks, citation, and emphasis omitted), *cert. denied*, 488 U.S. 981 (1988).

In construing the injury to a business or property requirement, the lower courts have repeatedly held that RICO does not apply to allow recovery for personal injuries, and thus excludes claims for such items as bodily injury, mental suffering, injury to reputation, loss of self-esteem, loss of earnings due to wrongful death, and harm to intangible -- albeit valuable -- property interests. *See Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1169 (3d Cir. 1987) (rejecting RICO claim predicated on an allegedly extortionate letter sent to residents: "The named plaintiff has alleged only injury in the nature of mental distress, not an injury 'in his business or property.' Therefore he has no cause of action on a RICO claim . . . ."); *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990) (personal injury, including injury to security and peace of mind, resulting in pecuniary loss, is not compensable under RICO); *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1178-80 (7th Cir. 1989) (affirming dismissal of RICO claim for personal injuries suffered from various acts of "harassment, intimidation and terrorism"

because such injuries are not injuries to business or property); *Schiffels v. Kemper Financial Servs., Inc.*, 978 F.2d 344, 353 (7th Cir. 1992) ("The defendants' actions might have caused Schiffels embarrassment, humiliation, and emotional distress, but injury 'to business or property' does not include such personal injuries, even if those injuries resulted in a pecuniary loss"); *Libertad v. Welch*, 53 F.3d 428, 436-37 (1st Cir. 1995) (feelings of intimidation and harassment resulting from being blocked by pro-life protesters do not constitute injury to business or property within RICO); *Grogan v. Platt*, 835 F.2d 844, 847 (11th Cir. 1988) (no recovery permitted under RICO for economic aspects of personal injuries inflicted by predicate acts involving murder), *cert. denied*, 488 U.S. 981 (1988); *Bast v. Cohen, Dunn & Sinclair, PC*, 59 F.3d 492, 495 (4th Cir. 1995) (rejecting RICO claim for "extreme mental anguish" allegedly resulting from defendant's recording of past communications: "An allegation of personal injury and pecuniary losses occurring therefrom are not sufficient to meet the statutory requirement of injury to 'business or property'"); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir. 1991) (no recovery for medical expenses and emotional distress resulting from plaintiff residents' exposure to toxic waste); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986) ("the phrase 'business or property' . . . would, for example, exclude personal injuries suffered"; thus sickness, poisoning, emotional distress, and death from exposure to toxic chemicals in workplace are personal injuries not cognizable under RICO) (emphasis omitted); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1300 (6th Cir. 1989) ("Recovery for physical injury or mental suffering is not allowed under civil RICO because it is not an injury to business or property"), *cert. denied*, 493 U.S. 1074 (1990); *Oscar v. University Students Co-op Ass'n*, 965 F.2d 783 (9th Cir. 1992) (*en banc*) (upholding dismissal of RICO claim for loss of value

to an intangible property interest, i.e., "use and enjoyment" of a residence, where plaintiff renter could not show injury to her leasehold interest by diminished fair market value), *cert. denied*, 506 U.S. 1020 (1992).[2] The law on this issue is clear -- personal injury is not cognizable under RICO's injury to "business or property" restriction.

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[2]*See also Jerry Kubecka, Inc. v. Avellino*, 898 F. Supp. 963, 969 (E.D.N.Y. 1995) ("plaintiffs' fears for their personal safety and any expenses incurred in an attempt to allay such fears are not injuries to 'business or property' within the meaning of section 1964(c)"); *Manson v. Stacescu*, 823 F. Supp. 76, 81 (D. Conn. 1993) (murder threat not injury to business or property under RICO); *Bennett v. Centerpoint Bank*, 761 F. Supp. 908, 916 (D.N.H.) ("In Count XXI, Bennett alleges that defendant Hahn threatened him physically on the telephone . . . and as a result Bennett was injured by his fear for his personal safety . . . . [T]he court finds that this type of injury is not an injury to 'business or property' as required by section 1964(c)", *aff'd*, 953 F.2d 634 (1st Cir. 1991); *Allman v. Philip Morris, Inc.*, 865 F. Supp. 665, 667-69 (S.D. Cal. 1994) (personal injuries from addiction to nicotine fail to come under RICO; out-of-pocket expenses incurred for treatment are the economic consequences of personal injuries and not recoverable under RICO); *McMurtry v. Brasfield*, 654 F. Supp. 1222, 1225 (E.D. Va. 1987) (dismissing RICO claim for emotional distress and interference with family relations); *Kouvakas v. Inland Steel Co.*, 646 F. Supp. 474, 476 (N.D. Ind. 1986) (dismissing RICO claim for loss of employment caused by emotional distress due to harassment and abuse); *Callan v. State Chemical Mfg. Co.*, 584 F. Supp. 619, 623 (E.D. Pa. 1984) (dismissing RICO claim for "mental anguish, loss of self-esteem and confidence or damaged reputations"); *Connor v. Halifax Hosp. Med. Ctr.*, 135 F. Supp. 2d 1198, 1219 (M.D. Fla. 2001) (loss of life is not injury to business or property under RICO); *Campbell v. A.H. Robins Co., Inc.*, 615 F. Supp. 496, 501 (W.D. Wis. 1985) (injuries caused by Dalkon Shield IUD do not fall within RICO: "it is evident to this Court, that personal injuries are clearly not injuries to either business or property within the context of this statute"); *Bast v. A.H. Robins Co., Inc.*, 616 F. Supp. 333, 335 (E.D. Wis. 1985) ("illness and injuries secondary to their contraceptive use of the Dalkon Shield IUD" are not injuries to business or property within RICO).

Furthermore, if the court determines that the asserted business or property injury is merely derivative of personal injury, then the RICO claim fails. *Grogan v. Platt*, 835 F.2d at 846; *Drake v. B.F. Goodrich Co.*, 782 F.2d at 644 (RICO claim not available to employee against employer for personal injuries suffered on the job, despite harm to employment); *Kouvakas v. Inland Steel Co.*, 646 F. Supp. at 477 (plaintiff's "loss of employment" was not actionable under RICO because it "deriv[d] from the personal injuries he suffered by reason of the defendants' alleged abuse and harassment").

In particular, where the plaintiff alleges emotional distress or invasion of privacy and business or property damages in the form of derivative loss, the courts find as a matter of law that the plaintiff has crossed the line from a proprietary-type claim (cognizable under RICO) to a personal injury claim that merely has negative pecuniary consequences (not cognizable under RICO). *See Doe v. Roe*, 958 F.2d 763, 770 (7th Cir. 1992); *Globe Int'l, Inc. v. Collins*, 9 Cal. App. 4th 393, 398-99, 401, 12 Cal. Rptr. 2d 109, 112 (1992) (dismissing RICO claim because "[t]he invasion of privacy and libel injuries upon which the RICO claim is based are like those claimed by the plaintiff in a personal injury action"). The Seventh Circuit in *Doe* examined the distinction between RICO business or property injury and the economic aspects of personal injury claims, as follows:

> [Plaintiff] blurs the distinction between proprietary and personal injuries. Contrary to what [plaintiff] seems to suggest, whether she can show a financial loss does not, by definition, establish that she has suffered a business or property injury within [RICO]. Most personal injuries -- loss of earnings, loss of consortium, loss of guidance, mental anguish, and pain and suffering, to name a few -- will entail some pecuniary consequences. Perhaps the economic

> [consequences] of such injuries could, as a theoretical matter, be viewed as injuries to "business or property," but engaging in such metaphysical speculation is a task best left to philosophers, not the . . . judiciary.

Doe v. Roe, 958 F.2d at 770; *see Grogan v. Platt*, 835 F.2d at 847 (the alleged "pecuniary losses are so fundamentally a part of personal injuries that they should be considered something other than injury to 'business or property'"); *Oscar*, 965 F.2d at 787 (looking past the labels to "[w]hat [the plaintiff] is really complaining about" and finding that it was personal, not proprietary).

Likewise, the courts dismiss claims under RICO that apply business or property labels to alleged injury but do not assert any tangible, actual pecuniary losses. *Oscar*, 965 F.2d at 785 (plaintiff must show a "concrete financial loss, and not mere injury to a valuable intangible property interest") (internal quotation marks omitted); *Steele v. Hospital Corp. of America*, 36 F.3d 69, 70 (9th Cir. 1994) (same); *In re Taxable Municipal Bond Securities Litigation*, 51 F.3d 518, 523 (5th Cir. 1995) (citing *Steele* and *Oscar* and concluding that "because the alleged injury is speculative and does not show a conclusive financial loss, we hold that [plaintiff's] RICO suit fails for lack of standing"); *Berg v. First State Ins. Co.*, 915 F.2d at 463-64; *Fleischhauer*, 879 F.2d at 1300 (restricting recovery under RICO to "amounts actually invested"); *Forsyth v. Humana, Inc.*, 827 F. Supp. 1498, 1519 (D. Nev. 1993) ("not all injuries are compensable under RICO, but rather only those which are given by a 'concrete financial loss'"); *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F. Supp. 1365, 1378 (D. Haw. 1995) (risk of financial loss "does not equate with the concrete showing of actual financial loss required under RICO").

In *Berg*, a group of insureds claimed that "they lost a valuable

property interest when their insurance was cancelled." *Berg v. First State Ins. Co.*, 915 F.2d at 463. The district court disagreed and granted summary judgment for defendants on the RICO claim. The appellate court affirmed the summary judgment ruling, despite the existence of various factual disputes, finding that the insureds' characterization of property injury was insufficient as a matter of law. *Id.* Specifically, the court held that the insureds' failure to establish actual financial loss or injury rendered the claim unrecoverable under RICO:

> Absent a showing sufficient to establish the existence of actual injury, summary judgment is required. . . . We explained [in a previous decision] that by "actual injury," we meant financial loss or injury. . . . [The insureds] claim injury to a valuable intangible property interest in their liability policies when the policies were canceled. . . . This statement [about loss of peace of mind concerning potential financial losses in future] describes a personal injury in the form of emotional distress, not a claim for injury to property as [RICO] requires.

Berg, 915 F.2d at 464 (emphasis in original; internal citations and editing marks omitted).

In the present case, respondents' claims of injury are in the nature of personal injuries, namely, fear resulting from alleged threats.[3] (The only RICO damages respondents sought were for "security measures" undertaken in response to the fear respondents allegedly felt. Final Jury Instructions pp. 41, 43.) Hence, respondents lack RICO standing.

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[3]The two business respondents obviously could not suffer personal injuries. But neither were they mentioned in the alleged threatening statements. Pet. App. 188a. Their claimed injury is strictly derivative, Pet. App. 208a, and hence must fall with the primary claims.

C. Nonexistence of FACE Civil Conspiracy Claim.

The FACE judgment must fall because of the nonexistence of respondents' civil FACE conspiracy claim.

There is a general federal *criminal* conspiracy statute. *See* 18 U.S.C. § 371. There is, however, no general federal *civil* conspiracy statute. Hence, the existence of a federal *civil wrong* of conspiracy, and the existence of a cause of action therefor, depend upon the particular statute in question. RICO, for example, expressly prohibits conspiracies, 18 U.S.C. § 1962(d), and authorizes civil suits for such conspiracies, 18 U.S.C. § 1964(c) ("violation of section 1962"). FACE, by contrast, contains no substantive conspiracy provision, 18 U.S.C. § 248(a), and no civil remedies for conduct outside the scope of FACE, 18 U.S.C. § 248(c)(1)(A). In short, there is no such tort as a FACE conspiracy, and no such claim as a civil suit for a FACE conspiracy.

Respondents went to the jury on both this nonexistent FACE conspiracy theory and a substantive FACE claim. Pet. App. 253a-256a. The jury was not required to distinguish between the two FACE theories. For each defendant, the jury was simply asked, "Did [defendant] violate or conspire to violate FACE?" Verdict at 3-17. Hence, the jury verdict may rest in whole or in part upon a nonexistent cause of action. This requires reversal. *Griffin v. United States*, 502 U.S. 46, 53-56, 59 (1991).

The Ninth Circuit ruled that petitioners waived this argument. Pet. App. 50a n.16. But the nonexistence of a cause of action is jurisdictional: a fictitious claim confers no federal subject matter jurisdiction. *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974). Hence, this defect cannot be waived.

This defect is also likely to require a different result in any remand. The Nuremberg Files website, for example, was the work of an independent nonparty. Absent a conspiracy theory,

it is difficult to see how petitioners could be held liable for this website.

CONCLUSION

This Court should grant certiorari. In the alternative, this Court should summarily reverse or vacate the judgment below and remand with instructions to vacate the district court's judgment.

Respectfully submitted this 12th of November, 2002,

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In the Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,
Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* OF PAUL DEPARRIE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, Paul deParrie ("deParrie") hereby submits this *amicus curiae* brief in support of the Petition For Writ Of Certiorari ("Petition") filed by Petitioners American Coalition of Life Activists ("ACLA"), et al. DeParrie has a unique role in this case and was treated as an *amicus* in this case while it was pending in the Ninth Circuit.[1] Counsel for Petitioners and Respondents have consented to the filing of this brief.

DeParrie was editor-in-chief of *Life Advocate* magazine for ten years because he felt that it provided the best forum for his writer/journalist vocation and his public activism. (Trial Tr. 2813-14) The magazine covered a wide range of news and commentary on national and international issues, much of it written by deParrie himself. (Trial Tr. 2813-14) *Life Advocate* magazine was destroyed by this litigation. (deP. Rep. Br. p. 7)

DeParrie has two distinct First Amendment interests in this case. First, deParrie is a published author and journalist who was credentialed as a journalist by the District Court in this very action so that he could cover the trial for *Life Advocate* magazine (Lodging, p. 1 or "L 1")[2]. One of his news stories about the "wanted-style" posters was classified as a threat by the District Court. (L 2-9)

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[1] DeParrie originally became active in the Ninth Circuit as a *pro se* appellant-non-party-in-interest. After he filed an opening brief and a reply brief, the three-judge panel treated deParrie as *amicus curiae*. His briefs filed with the Ninth Circuit will be cited herein as "deP. Op. Br." and "deP. Rep. Br."

[2] Lodging pages are designated by "L."

Second, deParrie is a political activist in the pro-life field, much of whose activism was conducted under the auspices of a defendant in this action, Advocates for Life Ministries ("AFLM"), a federally tax-exempt nonprofit organization that has also been destroyed by this litigation. DeParrie has designed and distributed other posters more confrontational in nature than those at issue in this case (L 12-23) – both before and after the alleged "poster pattern" theory was created for this case. Yet an Oregon Court of Appeals has deemed those other posters to be protected speech. *Hanzo v. deParrie*, 953 P.2d 1130 (OR. Ct. App. 1998). AFLM was, in turn, associated with petitioner ACLA, an unincorporated association of pro-life activist groups and individuals.

The District Court verdict and injunction ("Order") poses serious problems for deParrie in both capacities. First, in an amazing procedural twist that defies any traditional concept of due process, deParrie was enjoined by name in the Order even though he was not a party to the case, and then denied standing as an appellant in the Ninth Circuit. Like the Petitioners, deParrie is therefore enjoined from publishing, republishing or even *possessing* copies of the subject posters and website content, or their undefined "equivalent," and he is also prohibited from publishing, republishing or merely possessing "personally identifying information" about any of the respondents. (Order, p. 68) Second, the jury imposed aggregate damages of $109 million, in part because of an article that deParrie wrote in *Life Advocate* about a poster.

Thus, deParrie may be subjected to future contempt citations and/or imprisonment under the Order, not to mention massive damage claims, for basic First Amendment activity that would never be questioned in any other context. The Ninth Circuit Majority decision imperils the personal and

professional life of anyone courageous enough to publish articles or distribute protest literature condemning any of the respondents, for anything construed as "republication" of the posters or their "equivalent", or for publishing anything deemed to qualify as "personally identifying information" about any of the respondents. For these compelling personal and professional reasons, deParrie now appears in support of the Petition.

No counsel for a party authored this brief in whole or in part. The Life Legal Defense Foundation, P.O. Box 2105, Napa, CA 94558, contributed to the cost of printing this brief, but no other person or entity made a monetary contribution

STATEMENT OF THE CASE

DeParrie hereby adopts and incorporates by reference the Statement Of The Case presented in the Petition. Additional facts relevant to deParrie's interest are discussed in the context of specific issues below.

REASONS FOR GRANTING THE WRIT

This Court has previously reviewed First Amendment restrictions when "the question presented [was] of substantial importance". *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). The ominous threats to both free speech and freedom of the press - threats that somehow survived the scrutiny of the Ninth Circuit Majority - present questions equally important to justify the writ of certiorari.

The actual effect of the harms which the Ninth Circuit finds acceptable to legitimate First Amendment interests are discussed below from the perspective of an activist/journalist.

I. The Ninth Circuit's 6-5 affirmance of a plainly unconstitutional verdict and injunction is a direct attack on freedom of the press for amicus and all similarly situated commentators and activists.

> The general proposition that freedom of expression upon public questions is secured by the First *Amendment has long been settled by our decisions*. The constitutional safeguard, we have said, 'was fashioned to assure *unfettered interchange of ideas for the bringing about of political and social changes desired by the people*.' Roth v. United States, 354 U.S. 476, 484.

New York Times v. Sullivan, 376 U.S. 254, 269 (1964) (Emphases added).

> Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity. [The Government] thus carries a heavy burden of showing justification for the imposition of such a restraint.

New York Times Co. v. US, 403 U.S. 714, 714 (1971) (citations omitted).

> Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.

Id. at 717

These principles were frontally attacked by the Ninth Circuit Majority's reversal of the decision of the three-judge panel. Even *responsible* coverage of an important and hotly-debated national political issue is no longer safe.

For example, when a debate arose over the moral legitimacy of the use of force to stop abortions arose after Michael Griffin shot abortionist David Gunn in 1993, *Life Advocate* provided a forum for the best commentaries on both sides of the issue. Even when the magazine took an editorial position some months later, deParrie insured that all sides continued to get equal coverage. In fact, the balance tipped slightly in favor of those opposed to the use of force. (deP. Op. Br. p. 67) Such debates were a singularly important component of this nationally-circulated magazine.

The March 1995 issue of *Life Advocate* magazine carried deParrie's news story about the release of the "Deadly Dozen" poster (L 2-9), but it also included reports on other ACLA activities in Washington, D.C. during the *Roe v. Wade* anniversary. In fact, the March 1995 *Life Advocate* carried 21 other news stories, 14 letters to the editor, 5 commentaries, 4 cartoons, 5 "quotable quotes", and 1 photo essay.[3] The news coverage included a story about an ACLA picket held at Foundry Methodist Church (where then-President Bill Clinton was attending services)[4], a protest at the offices of the Health and Human Services against fetal experimentation, and a candlelight vigil conducted in front of an abortionist's house. Sidebar stories included information on the annual March for Life, the introduction of the ACLA as a group, an anti-abortion group from Ireland whose members traveled to Washington, D.C. for the activities, and a simple columnar list of the abortionists listed in the "Deadly Dozen" poster.[5] (L 9) Neither the poster itself, nor any actual representation of it, appeared in the magazine.

True freedom of the press ended with the verdict and Order. Not only had the posters themselves been declared "true threats," but the *news story* about one of the posters (largely written and photographed by deParrie) was deemed

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[3] None of this was allowed to reach the jury as "context."

[4] The Majority makes quite an issue of the "grim reaper" on the cover of the magazine (Op. at 7095), but the picture is merely one of the protesters standing outside President Clinton's church. It had nothing to do with the "Deadly Dozen" poster.

[5] While the names and some addresses of abortionists were listed there, the sidebar about the ACLA also listed names and addresses of the ACLA's leaders (L 6).

a "republication" of the poster and, thus, a "true threat." (L 2-9) Under the Order, the *news article* was deemed a "true threat" when in the possession of any defendant or those in "active concert with them." (Order, p. 65) DeParrie was even required to surrender to the District Court his personal family archive copy of the March 1995 issue of *Life Advocate* magazine. (deP. Rep. Br. p. 3) The District Court later ordered AFLM to cease paying its bills (rent, electric, etc.), to put all financial assets in the AFLM bank account, and not to remove them for any purpose. (deP. Rep. Br p. 7-8) Consequently, AFLM and *Life Advocate* ceased to function, and deParrie lost his job.

The Ninth Circuit has construed FACE, RICO and the First Amendment to prohibit journalist deParrie from writing a *news story* which included *information* about the content of a poster. Worse yet, it is the *informational content* that deParrie described from the poster, *not the poster format*, that allegedly made deParrie's news story a "republication" of a "true threat".

The threat to a free press is simply unprecedented.

II. The Ninth Circuit Majority Has Abandoned Any Pretext Of Protecting Controversial Speech.

The Majority's "poster pattern" theory departs radically from this Court's teaching that the only actionable "pattern" where speech is concerned requires incitement followed by imminent lawless action.

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of

> law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenberg v. Ohio, 395 US 444, 447 (1968)

The Majority evaded a proper application of that precedent by inventing a new category of actionable speech: "threat" by remote temporal association with *past* violence, following the speech of persons *other than Petitioners*. The significance of Petitioners' explicit advocacy for *lawful* action to bring abortionists to justice was effectively disregarded in favor of a theory that has no precedent in American law, and which allowed a jury to impute to Petitioners a state of mind directly contrary to what they actually said.

The Majority further undercuts the principle that free speech is best served when it is robust and even disturbing.

> *Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases*. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. *When such appeals do not incite lawless action, they must be regarded as protected speech*. To rule otherwise would ignore the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.

NAACP v. Claiborne Hardware, 458 U.S. 886, 929 (1982) (Emphases added)

> Accordingly, a function of free speech under our system of government is to invite dispute. *It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.* Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (Emphasis added).

As least as they apply to that "currently disfavored class of antiabortion protestors", *Lawson v. Murray*, 515 U.S. 1110, 1113 (1995) (Scalia, J., concurring in denial of cert.), the Ninth Circuit now limits free speech and freedom of the press to "dulcet phrases" and "safe" protests.

III. The Ninth Circuit has imposed an indiscernible standard for pro-life speech and journalism.

According to the Ninth Circuit Majority, the threat lies not in the content of the posters - *which the Ninth Circuit concedes is protected* even though the jury was not so informed — but rather in the posters' so-called "wanted-style *format.*" The Majority concluded that publication of earlier posters with a "similar" format, created and circulated by people other than petitioners, was followed months later by isolated acts of violence against persons named in these earlier posters. (deP. Op. Br. p. 32) The Majority dubs this temporal and coincidental relation between posters and violence as "the poster pattern", and converts future posters

with the same or "similar" format into *per se* death threats against the persons named, *regard-less of what the posters say*. (Majority Op. 7091, 7137)

The Majority's "poster pattern" theory defies the principle that restrictions on speech must give fair warning of what speech or conduct is proscribed. *Coates v. Cincinnati*, 402 U.S. 611 (1971). The Petition properly raises a vagueness challenge and refers to the "standardless speech restriction" now in place. *Petition at 14.* As a matter of due process, a law is void if persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Although vagueness challenges are most commonly raised in challenges to criminal statutes, they are no less important in a civil context when political activists can be crushed, as in this case, with punitive monetary sanctions infinitely beyond what anyone could ever pay. When an unprecedented and ill-defined First Amendment theory is unanimously rejected by the original three judge panel and then barely accepted by a 6 to 5 en banc majority, it is fair to say that the creation has and will "trap the innocent by not providing fair warning". *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

The principles set in motion by the Majority threaten ongoing deprivations of liberty and property without due process of law. Nowhere does the Majority give any guidance for identifying the actionable elements of the now-forbidden "wanted-style format", much less how one can determine the undefined "equivalent" of this format, which is also banned under the injunction. Instead, the Majority opinion offers the following:

It is not the words or captions chosen that make a "wanted-style" poster (Majority Op 7137-38).

It is the "WANTED" or "unWANTED" poster "*format*" that is forbidden by FACE and RICO (Majority Op. 7137-38).

This "wanted-style format" does not require use of the words "WANTED" or "unWANTED" (Majority Op. 7137-38).

The forbidden format may, or may not, use any of the words used in the previous "pattern" posters on Gunn, Patterson, and Britton (Majority Op. 7137-38).

The words used do not have to contain explicit threats (Majority Op. 7137-38).

The words do not have to contain ambiguous threats (Majority Op. 7137-38).

It is possible to use the forbidden "format" while publishing content that calls only for only lawful, peaceful protest
(Majority Op. 7137-38).

The words chosen are, in fact, "immaterial," according to the Majority. (Majority Op. 7137)

The forbidden "format" need not have any direct connection to any act of violence to gain

> "currency as a death threat" (Majority Op. 7121).
>
> The forbidden "format" need have only a remote or tangential relationship to *three* acts of violence (but not two acts of violence) in order to gain "currency as a death threat," even if thousands of other protest posters naming abortion doctors have no relationship, even merely temporal, to violence (Majority Op. 7121; Trial Tr. 2828; deP Rep. Br. p. 32).

This is the "unascertainable standard" prohibited in *Coates* and dozens of other cases. Because the forbidden "format" does not depend on content and is never described, neither deParrie (nor any other publisher) can know for sure what violates the Order, or FACE generally. The only safe course for them is to cease publishing any posters, or indeed anything at all, concerning the respondents.

IV. The Ninth Circuit has effectively outlawed a classic form of political activism.

As a writer, deParrie has studied the history of political activism, especially the use of handbills and posters. The accusatory poster has been a staple in this country since before the Revolution, and in deParrie's life, since the Vietnam war. (Trial Tr. 2793)

A poster that declared President John F. Kennedy "wanted" for "treason" was handed out in the days preceding – and even on the day of - his assassination. (L 10) The JFK "wanted" poster was later evidence before the Warren Commission. Such posters are common currency in

American political activism.[6] Prior to this case, the Ninth Circuit recognized that the threshold of a "true threat" against the President is *lower* than for threats against private citizens, *U.S. v. Twine*, 853 F.2d 676 (9th Cir. 1988). It now appears that in the Ninth Circuit abortionists enjoy greater protection that the President.

The Majority's observation about the use of the posters in this case was very selective. The Majority was correct, for example, when it observed that Petitioners knew of the three previous incidents where abortion workers were killed,[7] but far more clear (and sharing no such emphasis) was Petitioners' awareness that the anti-abortion movement had been issuing countless such posters for many years *without* subsequent violence. Petitioners were aware that such violence was *an anomaly*, not the norm. (Trial Tr. 2828; Kozinski Dissent 7157) Many of the Petitioners were readers of *Life Advocate*, which carried regular stories about the use of posters in various locales. DeParrie testified at trial about having personally seen hundreds of such posters and having in his possession in court about 85 of them. (L 24-67) None

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[6] A "WANTED" poster of President George W. Bush (L 11), recently handed to deParrie at a May Day Rally in Portland, Oregon, appears on the website www.motherearth.org /bushwanted.

[7] The Majority repeatedly observes that these posters were issued prior to the deaths of the named abortionists, yet never points out that the posters were followed only remotely by violence – and in Patterson's case, remotely in distance from place the posters were published (i.e Pensacola, Florida, whereas the scene of the violence against Patterson was Mobile, Alabama).

of the subjects of those posters had been shot or killed. (Trial Tr. 2828)

Furthermore, in 1995, deParrie organized, under AFLM, the S.H.A.M.E.[8] Campaign, which consisted of picketing the home of an abortionist each month. Part of the process was to create a poster of each abortionist, complete with picture, home address, and phone numbers. The posters were then passed out door-to-door in the neighborhood during the picket. After a 16 month campaign, 15 abortionists had been picketed, including the separate residences of Plaintiffs (Respondents) James Newhall and Elizabeth Newhall (L 12, 16, 17, and 18), whose neighbors received a copy of the posters. Neither of the Newhall's took any legal action or bought bullet-proof vests in response to the posters and pickets. ***None*** of those so picketed were shot at or killed (deP. Rep. Br. p. 32), nor were the posters even part of the complaint in this case.

One reaction to the S.H.A.M.E. campaign did come from Jude Hanzo, executive director of Portland Feminist Women's Health Center, Inc. After two pickets were held in front of her house (eight months apart), Hanzo sued deParrie under Oregon's stalking law with a complaint replicating all the specious and overreaching "context of violence" claims made in this case. After the trial court ruled that deParrie was a stalker, the Oregon Court of Appeals reversed on constitutional grounds. *Hanzo v. deParrie*, supra. The posters were described in detail, *Hanzo* at 530-32, and are

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[8] The acronym stands for: Stigmatize, Harangue, Agitate, Mortify, and Expose.

functionally indistinguishable from the "Deadly Dozen" and "Crist" posters in this case.

As the *Hanzo* decision makes clear, deParrie's own S.H.A.M.E. campaign posters were issued long after the "third strike" – the shooting of Dr. Gunn – which, according to the Majority, rendered all such posters "true threats." Evidently, the Oregon Court of Appeals lacks the creativity displayed by the Ninth Circuit and the District Court in this case, and could not discern the "poster pattern".

In any event, the compelling need for review of the Ninth Circuit Majority's decision rests not only on the mind-boggling damage award, but also on the First Amendment confusion that lives on with the Order. After the District Court issued it, and not wanting to violate it, deParrie approached the Court for permission to display a poster and a 15' x 3' banner that he had designed before the Order was issued.[9] (L 68) Respondents objected to the Court's rendering an opinion on the poster and banner, and the Court refused to do so on the premise that such a ruling would be premature. (deP. Op Br. p. 27)

Unless this Court reviews the Ninth Circuit decision, there is no telling what will be construed as a "WANTED-style" poster. Because the Majority deems actual content unimportant, nearly any anti-abortion leaflet distributed near an abortionist could be so construed. Consequently, the only way for deParrie or anyone else to know whether a poster/banner/leaflet is a forbidden "equivalent" is to risk

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[9] The Order specified that the court retained jurisdiction "for all purposes, including * * * interpretation" of the Order (Order, pp. 69-70).

criminal prosecution by daring to engage in this classic form of political protest.

CONCLUSION

For the foregoing reasons, as well as the reasons articulated by Petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas Condit

(5)

Supreme Court, U.S.
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No. 02-563

IN THE

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL., *Petitioners,*

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief of Amicus Curiae Life Legal Defense Foundation In Support of Petition for Certiorari

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Interest of Amicus[1]

Life Legal Defense Foundation ("LLDF") is a California non-profit corporation which provides legal assistance to many pro-life individuals who, while not facing judgments as gargantuan as the one handed down in this case, have been and will be chilled by the continual circumscribing of First Amendment rights in the context of anti-abortion advocacy. Even assuming that every such decision has been correct, the effect of drawing a line around anti-abortion advocacy as tightly as the First Amendment might permit, coupled with excessive penalties in the form of damages or attorney fee awards for even touching the line, is devastating.

Freedoms of expression require breathing space. *NAACP v. Button*, 371 U.S. 415, 433 (1963). The antithesis of such breathing space is found in this case, where the line between protected free speech and actionable threats is so unclear that the court splits 6-5 on the issue, but the cost to defendants of guessing wrong which side would prevail runs into tens of millions of dollars.

Introduction

As both the majority and the dissenters agreed, the posters and website at issue in this case contain no threatening language. According to the majority, "the language itself is not what is threatening," but rather "it is the use of the 'wanted'-type format in the context of the poster pattern—poster followed by murder—that constitutes the threat." Pet. App. 39a.[2] However, "[t]he posters and website are all public presentations on a matter of current moral and political importance; they provide information to the public on that matter and propose a—peaceful, legal—course of action; and they were presented with explicit reference to great moral and political controversies of the past." Pet. App. 75a. Thus, the petitioners' speech "is, on its face, clearly, indubitably, and

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[1] This brief was not written in whole or part by counsel for any party. No one other than amicus Life Legal Defense Foundation made any monetary contribution to its preparation. Counsel for all parties have consented to the filing of this brief.

[2] References in this brief to the Petition for Writ of Certiorari are designated "Pet." References to the Appendix to the Petition are designated "Pet. App."

quintessentially the kind of communication that is fully protected by the First Amendment." Id.

This Court should grant the Petition in order to determine whether and under what circumstances speech which is "clearly, indubitably, and quintessentially" protected by the First Amendment may be, after the fact, deemed unprotected speech, both proscribable and punishable with monetary damages.

I. The Objective "True Threats" Standard Applied by the En Banc Panel Sanctions the Suppression of Constitutionally Protected Speech and an Outright Ban on Certain Forms of Speech

A. *The objective test employed by the Ninth Circuit allows the subjects of unwanted speech to dictate the limits of such speech*

The definition of "threat of force" employed by the Ninth Circuit in determining whether the petitioners had violated the Freedom of Access to Clinic Entrance Act (FACE), 18 U.S.C. § 248, was "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person." Pet. App. 28a.

The Ninth Circuit's test is fatally flawed in the context of speech which is otherwise constitutionally protected. By employing an objective test to the speaker ("a reasonable person would foresee") and a subjective test to the reaction of the subjects of the speech, the Ninth Circuit's test allows the sensibilities of the subjects of speech to dictate the limits of protected speech which is critical of them or their activities.

If the mark of a "true threat" is simply what a reasonable person would foresee would be perceived as a threat by the subject, then the subject can take away the uncertainty by informing all potential speakers of the types and content of speech that he or she perceives as threatening. In the case of abortion providers, they or their spokesmen, such as the National Abortion Federation, National Abortion Rights Action League, and National Organization for Women, could publicly announce that abortion providers perceive all references to "death," "Hell," "guilt" and

"judgment" as threats, as well as many other scriptural references to eternal punishment and the afterlife. Moreover, as abortion providers appear to screen out all references to unborn children from what they hear and see, speech which includes words such as "killing," "murder," "blood," and "pain" are perceived, not as descriptions of what unborn children undergo, but as threats against the providers of these services.

Indeed, such an announcement might well not be a sham. If their public pronouncements are to be believed, abortion advocates do indeed believe that most of what pro-life activists say is threatening and is intended as a threat. For example, Florida National Organization for Women filed a lawsuit opposing the use of the phrase "Choose Life" on license plate frames because it is a "religious motto which has frequently been used to harass, intimidate and at times kill and maim those who seek to exercise their rights, including the right to choose abortion, . . ." *Florida NOW et al. v. State of Florida, et al.*, Case No. CL-9911655 AD, Amended Complaint for Declaratory Judgment and for Temporary and Permanent Injunction at ¶22.[3] Moreover, Florida NOW argued, the "state endorsement of a motto, which appears innocuous but has been used by those who threaten the property, health and the lives of others, represents a clear and present danger to the people of this state." Id. at ¶21. If Florida NOW interprets a "Choose Life" license plate frame as a dangerous incitement to violence and murder, it would undoubtedly interpret the utterance of the phrase "Choose Life" directly to or about a specific abortion provider as a "true threat."[4]

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[3] Relevant portions of the complaint are included as Appendix A to this brief.

[4] In a case pending before this Court, *NOW v. Scheidler*, Nos. 01-1118, 01-1119, an abortion clinic administrator in Florida testified that she "didn't know how to interpret" a message left for her on the defendant's business card which read "Linda, choose life." She further testified that she could not have reasonably interpreted it to mean that she should stop being involved in the abortion industry and do something else. Tr. at 1488–89. See also, in the same case, Brief of Amicus Curiae Catholic Conference of Illinois, filed in United States Court of Appeal for the Seventh Circuit, at Appendix A-14 (press release from National Organization for Women stating that a prayer vigil led by Francis Cardinal George in front of an abortion clinic was "an act of aggression," and that "900 people marching down the street and stopping in front of a clinic to pray is confrontational").

Florida NOW further argued that the term "Choose Life" is used in order "to demonize those who believe in the right to choose abortion and is meant to infer [sic] that those who disagree with their views do not believe in choosing life but rather choose death. By adopting this terminology, those who oppose abortion have created a climate in which doctors who perform abortions, women who seek abortions, and all those who protect abortion rights are considered murderers and accomplices to murder and are thus fair game and legitimate targets for theft, vandalism, death threats, and murder." Id. at ¶23. In other words, voicing the belief that abortion is the deliberate and wrongful taking of innocent human life is the same as endorsing the killing of abortionists. Clearly, this endorsement could be reasonably interpreted by the listener as a "true threat" if directed at or about a particular abortion provider.

To take another example, the undersigned deposed a Planned Parenthood employee who testified that she considered a defendant's statement "You are part of the culture of death," to be a threat. The phrase "culture of death" was coined by Pope John Paul II to describe the societal acceptance of abortion, euthanasia, and contraception, among other practices. Encyclical letter *Evangelium Vitae*, ¶12. The employee, however, understood the reference to "death" as a threat to herself. Under the Ninth Circuit's ruling, now that the defendant is on notice that this employee so perceives his reference to the "culture of death," his use of that phrase in the future may subject him to civil and criminal sanctions.

The "entire context and . . . all the circumstances" in which anti-abortion beliefs are presently voiced in this country includes abortion providers and advocates continuously affirming and reaffirming each other in their fear that they are at risk of being injured or murdered by fanatical pro-lifers, which to them means virtually all pro-lifers. They have no interest, at least publicly, in assuaging these fears, rather than stoking them. The "entire context" also includes the news media which, through selective reporting, affirm the impression that most, if not all, pro-life advocates are violence-prone fanatics. The "entire context" includes movies, books, and television shows which build story lines around the stereotype of the dangerous, fanatical anti-abortion

zealot. The "entire context" includes legislation based on "findings" that abortion providers are an endangered species in constant danger of violence from fanatical pro-lifers.[5]

This is the "entire context" which, under the Ninth Circuit's objective test, the "reasonable person" must consider before engaging in constitutionally protected speech, in order to avoid words or "formats" which might cause an abortion provider to feel threatened. According to the Ninth Circuit, the test is not whether the speaker intends to convey a threat, but whether the speaker can foresee that the eggshell plaintiff, the abortion provider, will perceive a threat.

Under the Ninth Circuit's test, the subject of criticism, the abortion provider, can dictate the limits of constitutionally protected speech by claiming to perceive a coded threat in facially unthreatening speech, and by communicating that perception to potential speakers. Opponents of abortion will be reduced to such

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[5] See, e.g., SB 780, enacted 10/14/2001, adding Cal. Pen. Code § 423 et seq. and 13775 et seq., finding that the "level and threat" of "anti-reproductive rights crimes" remained "unacceptably high" and highlighting federal actions to reduce "anti-reproductive rights crimes," virtually all of which pertained to protecting "reproductive health services providers" from violence and threats of violence; also mandating training of police officers on "anti-reproductive rights crimes," in cooperation with "subject matter experts," including "the American College of Obstetricians and Gynecologists, the California Abortion and Reproductive Rights Action League, the California Medical Association, the Feminist Majority Foundation, the National Abortion Federation, the National Organization for Women, and the Planned Parenthood Federation of America." Cal. Pen. C. § 13776.

Another law, AB 797, enacted 9/6/02, amends Cal. Elec. Code § 6215 to allow reproductive health services providers, employees, volunteers, and patients to keep their addresses confidential for purposes of voter registration and service of process. The Act is based on findings that "Persons and groups that oppose reproductive rights attempt to stop the provision of [these] services by threatening reproductive health care service providers, clinic, employees, volunteers, and patients. . . . The threat of violence toward reproductive health care service providers and those who assist them has clearly extended beyond the clinic and into the home. . . . In order to prevent potential [sic] acts of violence from being committed against providers, employees and volunteers . . . it is necessary for the Legislature to ensure that the home address information of these individuals is kept confidential." "Reproductive health care services" is defined as "health care services relating to the termination of a pregnancy in a reproductive health services facility." § 6215.1(b).

stirring and imaginative declarations as "Abortion is bad," "Respect life," and "Abortion, along with several other things, is contrary to social justice."

B. *The objective test based on the "entire context and . . . all the circumstances" is inherently vague and subjective as to the listener's perception of the context and circumstances*

As noted in Judge Berzon's dissent, there was some inconsistency in the trial court's instruction to the jury on the objective test for a "true threat" being coupled with the admission of prejudicial evidence concerning the petitioners' views on the justifiable use of force against abortion providers. Pet. App. 107a–08a. Since the test is whether "a reasonable person would have foreseen" how the speech would be perceived by the listener, the subjective views and opinions of these particular petitioners were irrelevant to that determination. Any individual who published the posters, even an outspoken advocate of nonviolence, could be found liable for publishing these alleged "true threats," since any "reasonable person" would have known the reaction of the respondents.

The consequences of this are quite staggering, as abortion opponents have been circulating posters of abortion providers for years. Pet. App 55a. Under the Ninth Circuit's ruling, each of the thousands of posters published after 1994 is a violation of FACE and a predicate act under RICO. Thus, if the Ninth Circuit's ruling is upheld, the individuals who have already published these posters are all RICO defendants-in-waiting, anticipating the knock of the process server at the door to hail them into federal courts across the country.

Once enmeshed in such a suit and assessing whether to fight or fold, these defendants will face myriad questions concerning their actual liability under the test enunciated by the Ninth Circuit. Do the "entire context and . . . circumstances" include what the "victim" of the alleged threat knows, or thinks he knows, about the speaker's beliefs, practices, or history? Is a pro-life speaker responsible for knowing what an abortion provider knows about him (the speaker)? Can a defendant/speaker be held liable because he should have known that an abortion provider believed he (the speaker) has a history of advocating or participating in violence,

even if that belief was in fact mistaken? Even if the speaker made frequent public declarations of his opposition to violence, can he count on those having come to the attention of the abortion provider and becoming part of the "entire context" in which his statement would be interpreted? What if the abortion provider admits that he knew of the speaker's public statements against violence, but says that he didn't believe them?

Further, do the "entire context and . . . all the circumstances" include what the *speaker* knows, but the abortion provider may or may not know? How can the speaker know whether the abortion provider knows "all the circumstances"? For example, in the instant case, the Ninth Circuit held that petitioners should have known that the posters would be perceived as threats, because of the so-called "poster pattern," a pattern of three doctors being killed after their names appeared on "wanted" posters. Pet. App. 39a.[6] However, in setting out the evidence underlying the "poster pattern," the panel relied only on certain facts, while ignoring other facts in the record which undercut the pattern. The most glaring example of this is that one of the three killings occurred during a robbery attempt, with no connection to anti-abortion activity ever established. Pet. App. 55a, Tr. 131, 1197. Another of the killings was committed by someone who had no connection with the making of the poster. Pet. App. 55a. Moreover, there was evidence that posters about hundreds of doctors were in circulation, with no violence being committed against them. Id. Finally, the petitioners had no involvement in making posters about any of the murdered doctors. Id. A "reasonable" speaker, familiar with "the *entire* context and . . . *all* the circumstances," including these, would not foresee that the subject of an anti-abortion poster would perceive it as a threat that he would harm that person. Yet, under the Ninth Circuit's test, the speaker may be held liable if it turns out that the listener was aware of only some of the pertinent facts.

Once again, the objective test shows itself to be highly susceptible to manipulation by those who wish to chill or completely

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[6] The majority further elaborated that the poster format "*resulted* in the death of three doctors who had also been publicly, yet specifically, targeted." Pet. App. 41a (emphasis added). This extrapolation of a cause-and-effect relationship as if it were an established fact has no support in the record.

silence protected political speech critical of them and their activities. With the assistance of ideological allies and a compliant media, they can ensure that their knowledge of the "context " and "circumstances" in which speech is uttered is selective, with all inconveniently exculpatory facts filtered out.

C. *The objective test results in quintessential constitutionally protected speech being deemed unlawful and unprotected through events outside the speaker's control*

It is instructive to consider the results if the same objective test applied by the Ninth Circuit in the instant case were to be used in the context of defamation. Suppose that, in the course of a year or two, three abortion providers were accused and/or convicted, in separate incidents, of murder for taking the life of a child who survived an abortion procedure. Before, during, and after the time of these events, abortion opponents frequently referred to abortion providers as being engaged in "killing babies" in the context of their abortion practice.[7] After the third doctor is convicted of murder, some abortion providers sue various pro-life speakers for using the term "kills babies," claiming that, under all the facts and circumstances, the term now has a different meaning, and a listener might reasonably interpret this as a statement that the plaintiffs have committed the crime of murdering born children. (To make the analogy more precisely fit the facts of the instant case, the abortion providers would have first heard the particular statements from self-proclaimed experts in libel law, probably lawyers, who inform the abortion providers that the statements are defamatory and that people understand the statements to mean that they are murdering born children. These experts would also be allowed to testify at trial that, based on their expertise, they told the plaintiffs the statements were

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[7] Cf. *Cannon v. City and County of Denver*, 998 F.2d 867, 874 (10th Cir. 1993) ("although the words 'killing' or 'murder' are certainly emotionally charged, it is difficult to conceive of a forceful presentation of the anti-abortion viewpoint which would not assert that abortion is the taking of a human life").

defamatory. Such testimony is admitted ostensibly to support the plaintiffs' emotional distress claims.)[8]

If the Ninth Circuit's objective standard were applied, the speakers may very easily be held liable, because "a reasonable person would have foreseen," in light of the pattern of convicted doctors, that a listener would interpret the statement "Dr. X. kills babies" to be a statement that Dr. X is guilty of the crime of murdering born children. Besides punishing the speakers, the decision would put on notice all other speakers that the phrase "kills babies" as applied to abortion providers is presumptively defamatory.

As can be seen from this example, the First Amendment demands a more stringent standard than the objective or negligence standard employed by the Ninth Circuit. Such a standard too easily allows speech that is "clearly, indubitably, and quintessentially" protected by the First Amendment to be deemed unprotected and to subject the speaker to civil and criminal sanctions.

D. *The objective test for true threats exacerbates the already existing imbalance between plaintiffs and defendants in litigation involving political speech*

In his dissent, Judge Kozinski notes that, though the injunction affirmed by the court is a facially more direct prohibition on speech, the crushing liability verdict, which will keep petitioners from rising above poverty level for the rest of their lives, has the greater chilling effect, as it will surely cause "other speakers to hesitate, lest they find themselves at the mercy of a local jury" and similarly "crucified financially." In this regard, he states, the liability verdict is far more damaging than the injunction, because "the latter at least gives notice of what is prohibited and what is not." Pet. App. 68a.

Unfortunately, the laws under which respondents brought their claims ensure that there is no "one free bite" for a speaker. By providing for attorney fee awards to successful claimants, these laws ensure that, even if only injunctive relief were granted, the

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[8] See Pet. App. 87a–93a (Berzon, J., dissenting) (discussion of admission, over petitioners' objection, of testimony of federal agents concerning their statements to plaintiffs concerning the alleged threatening nature of the posters).

defendants will end up paying a substantial amount in attorney fees, enough to chill them and anyone else who learns of the judgment from engaging in speech which may, after the fact, be deemed unprotected.[9] Ironically, the closer the First Amendment question (as in this case, where the three-judge panel unanimously found the speech protected, and the en banc panel split 6-5 on the issue), the more intensely litigated the case will be, and the more devastating the fee award against the defendant who may be ultimately unsuccessful. The defendant's good faith belief, in conformity with that of several Ninth Circuit judges, that his speech is protected will count for nothing. The plaintiff, meanwhile, can litigate without any such threat. If he loses, he is at most liable for the defendant's costs.

This Court cannot change that statutory imbalance of power. However, this Court can and should proceed as it has done in shaping its First Amendment jurisprudence governing defamation. In that context, it has considered the real-life incentives, deterrents, and resources of various classes of parties engaged in various types of speech. As Judge Berzon noted, this Court has developed "doctrinal protections within defamation law that minimize self-censorship of truthful speech, "which protections "are based upon realistic assessment of the vagaries of litigation

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[9] See also *Feminist Women's Health Center v. Blythe*, 32 Cal. App. 4th 1641 (1995), cert. denied, sub nom. *Reali v. Feminist Women's Health Center*, 516 U.S. 987) (awarding attorney fees under "private attorney general" statute (Cal. Code of Civ. Proc. § 1021.5) to abortion clinic and against defendants who unsuccessfully opposed imposition of speech-free zone in front of abortion clinic); *Planned Parenthood of Santa Barbara, Ventura, and San Luis Obispo Counties v. Aakhus*, 14 Cal.App.4th 162 (1993) (awarding attorney fees under private attorney general statute to plaintiff abortion clinic, holding that enjoining four defendants enforced important right and conferred substantial benefit on the public because the right to abortion "would be a mere mockery if the courts allowed its individual exercise to be challenged by an organized campaign of intimidation, ridicule, and mockery;" further holding that "the interests of [clinic] and its clients, rendering and receiving reproductive medical care, are mutual and inseparable"). Under the holding in *Aakhus*, any clinic which successfully obtains injunctive relief based on alleged wrongdoing by pro-life speakers is presumptively entitled to an award of fees for having enforced an important right and benefited the public, even if it had a financial stake, because its interests are "mutual and inseparable" from those of its clients. In other words, what's good for an abortion business is good for women and thus good for the public.

and the fear of crippling damages liability." Pet. App. 77a. Rather than a unitary solution, "the balance has been struck with regard to subcategories of defamation, according to the nature of the communication, the nature of the parties, and, to some degree, the purpose of the speech." Pet. App. 78a.

Similarly, this Court can and should, in developing its jurisprudence on "true threats," consider where applicable statutory enactments have already placed the benefits and burdens of civil litigation. Will a speaker on a hotly debated public issue be inclined to push the First Amendment envelope vis-à-vis threats[10] when he can be sued by highly motivated ideological opponents with little to lose?[11] When, if he is found to have engaged in unprotected speech and enjoined from doing so in the future, he will at a minimum have to pay tens or hundreds of thousands of dollars in attorney fees to his opponent, aside from any damages liability? When the law provides for statutory damages, so that a plaintiff need not even show actual damages? See 18 U.S.C. § 248(c)(1)(b). When the law provides for treble damages? See 18 U.S.C. § 1964(c).

It can hardly be disputed that recent decades have seen a shift toward the use of civil litigation as a means of achieving ideological goals. This shift has been accompanied by a systematic accumulation of disincentives to challenging the reigning orthodoxies of the day. Legislative majorities reflecting these orthodoxies gen-

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[10] Or any other sort of conduct, such as picketing, leafleting, and counseling. This same imbalance of risk and incentive exists as to these activities, which are chilled and hemmed in by statutes and case law which allow an ideological opponent (and target of critical speech) to turn a disputed infraction such as blocking the sidewalk or "interfering with unfettered access" in a driveway into the basis for, e.g., liability under FACE and/or attorney fee awards for defending against "buffer zone" injunctions. See n. 8, supra.

[11] Although theoretically a plaintiff may have to pay his own attorney, as a practical matter, where political causes are involved, the case is likely to be handled pro bono by a private law firm or by a public interest law firm which shares the plaintiff's ideological motives, particularly where the plaintiff is a non-profit corporation such as Planned Parenthood. See e.g. «http://www.fedsoc.org/Publications/Pro Bono/probonosurvey.htm» where Respondent's counsel, Paul, Weiss, Rifkind, Wharton & Garrison, is listed as pro bono counsel in this action. Alternatively, a plaintiff can use the potential for an attorney fee award (with multiplier) to attract counsel on a contingency basis, an incentive not available to defendants seeking representation.

erate laws which favor their constituencies over their opponents in litigation. These laws are interpreted and applied to particular fact situations by judges who may owe their appointments to having supported, or at least not opposed, those same orthodoxies, or whose chances for advancement would be severely hampered if they deviate from the party line—witness the recent bruising Senate confirmation hearings of circuit court nominees who were defeated in committee on the grounds that they are suspected, based on past rulings, of harboring the slightest sympathy for the anti-abortion viewpoint.

The long-term goal of those who challenge the status quo is, of course, to change the status quo by making the political process more cognizant of and responsive to the justice of their claims. In the meantime, however, the out-of-power minority must be able to rely on the *full* protection of the First Amendment to preserve its toehold in the public debate. This is, indeed, the primary function of the First Amendment: to protect the right to be heard of political minorities whose voices could otherwise be silenced by those who currently hold the reins of power.

The availability of FACE, RICO and similar statutes to civil plaintiffs in disputes over political activity already creates a substantial chilling effect on political speech and association, by creating mechanisms for ideological opponents to exact penalties far in excess of what might be expected in a criminal prosecution with all criminal due process safeguards in place.[12] The mere threat of

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[12] See *N.Y. Times v. Sullivan*, 376 U.S. 254, 277–78 (1964) (citations omitted): "The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. Alabama, for example, has a criminal libel law which subjects to prosecution 'any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude,' and which allows as punishment upon conviction a fine not exceeding $500 and a prison sentence of six months. Alabama Code, Tit. 14, § 350. Presumably, a person charged with violation of this statute enjoys ordinary criminal law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double jeopardy limitation

the litigation itself, necessitating the expenditure of scarce time and resources on defense, exerts a chilling effect. To employ, on top of that, an objective or negligence test for "true threats" under these statutes or their predicate offenses is a heavier burden than First Amendment rights can bear.

II. The En Banc Panel's Decision Conflicts with this Court's Frequent Iteration that Freedoms of Expression Require Breathing Space to Survive

It might be argued that, contrary to the examples raised in Sections I(A) and (C) above of specific words and phrases being deemed unprotected, the Ninth Circuit did not condemn any specific words or phrases, but only a "format" with a particular "style" published in a certain "context." However, this very lack of specificity exacerbates, rather than relieves, the chilling effect of the decision.

This Court has frequently held that freedoms of expression require breathing space to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986). The antithesis of such breathing space is found where the line between protected and unprotected speech, based on "format" and "context" and "style" and "patterns" is vague and imprecise, yet the penalty for being found to have crossed the line is financial ruin. Vagueness in the face of such sanctions will inevitably lead to severe self-censorship and a "pall of fear and timidity . . . upon those who would give voice to public criticism." *N.Y. Times v. Sullivan*, 376 U.S. at 278.

Given that the Ninth Circuit cited the "poster pattern" as the justification for holding that otherwise quintessential protected political speech, uttered in a public forum, was in fact unprotected and sanctionable, one would expect the Court to have clearly and tightly defined what the "poster pattern" consists of. Unfortu-

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applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. . . . [T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

nately, it did not. Indeed, the farther one reads into the decision, the vaguer the parameters of the "poster pattern" become.

A. *The limits of the so-called "poster pattern" are vague*

The Ninth Circuit's definition of a true threat begins "a statement which . . ." What was the "statement" here? Was is that the petitioners were "guilty"? Was it that they were "guilty of crimes against humanity"? Was it the publication of their home addresses? One poster offered a reward for information leading to the revocation of the respondents' medical licenses, while the other exhorted readers to write, picket, or leaflet respondent Crist's home, and offered a reward to anyone who could persuade Crist to turn from child killing. Other than the description of the contents of the posters at the beginning of its decision, the Ninth Circuit never mentioned these portions of the posters, so presumably the finding of the threat was not premised on any of that language. Instead, the Court simply referred in general terms to "'wanted'-style posters."

The Ninth Circuit's holding seems to be that a poster which proclaims an abortion provider "guilty" is a threat, because "guilty" is similar enough to "wanted" and "unwanted" to make such a poster a "'wanted'-style poster." However, the Ninth Circuit's analysis of the crux of the threatening "statement" finds no support in the testimony of the allegedly threatened individuals. These individuals testified that it was being *singled out* which made them feel threatened, and not necessarily by the petitioners or anyone under their control.

The Ninth Circuit's reliance on the "poster pattern" and "'wanted'-style posters" leads to one of three equally absurd conclusions.

A) The Court's "poster pattern" analysis does not apply to any other format in which the same information and opinions might be conveyed. A newspaper ad containing the same text; a radio announcement conveying the same information and making the same pleas; a picket sign with the same information; a billboard-sized rendition of the posters, placed on the side of a truck—none of these would constitute "true threats" because they were not on 8-1/2 by 11" pieces of paper.

B) The Court's analysis *does* apply to the above examples, as long as they contain substantially the same words and information as the posters in this case.

C) The Court's analysis applies to any speech which "singles out" individual abortion providers.

The problem with Conclusion A is that it treats one particular physical expression of ideas and information, an 8-1/2 by 11" piece of paper, as if it were in and of itself a physical weapon or dangerous instrument, which it is not. The respondents themselves, as well as the district court, did not limit themselves to that argument, but cited the discussion of the posters and their contents in editorials as "republications" of the threats. Pet. App. 11a, 135–36a; Tr. 59, 144–45, 962–63, 1069, 1360. Moreover, by holding that the Nuremberg Files listing of the respondents was also a threat, the Ninth Circuit made clear that its holding is not limited to speech printed on a piece of letter-sized paper.

The problem with Conclusion C is that it is a horrendous infringement on the First Amendment. See e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903–04 (1982) (identification and exposure of boycott violators to name-calling and social ostracism was protected speech); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (distribution of "offensive" and "coercive" pamphlets exposing real estate agent's practices was protected speech).

The problem with Conclusion B is that it is will quickly lead to Conclusion C. Just as the Ninth Circuit glossed over the differences between the earlier "wanted" and "unwanted" posters published by others and the "guilty" posters published by the petitioners, so will future plaintiffs argue that any differences between the petitioners' posters and the speech at issue in their case are insignificant compared to the similarities.[13] Indeed, the plaintiffs will probably use the defendants' attempt to differentiate their posters as further evidence against them: "Q: Isn't it true that you deliberately avoided the phrase 'GUILTY of Crimes Against

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[13] See also the district court's injunction, affirmed by the Ninth Circuit, which prohibits the petitioners from publishing, republishing, or possessing the posters or their "equivalent." Pet. App. 182a.

Humanity' and instead used the words 'REPENT, Dr. Smith, of your blood guilt,' just to avoid liability? You were trying to be just different enough to avoid a lawsuit, weren't you? Your purpose in publishing the posters was the same, was it not?"[14] In short order, any speech which singles out abortion providers, published in any format, could be held to fit the "poster pattern," with the differences brushed aside as mere attempts to . . . be different.

"Could" is the operative word in the last sentence. Whatever might ultimately be held in particular factual contexts to be contained within the "poster pattern," the answer is not dependent on the particular words used, e.g., "wanted" vs. "guilty." As the Ninth Circuit said, "differences in captions or words are immaterial." Pet. App. at 39a. Nor is the format determinative, e.g., poster vs. website vs. republication in newspaper editorials. So speakers must guess as to whether their speech might be held to be similar enough to the poster pattern to constitute a "true threat," and lead to their being found liable for hundreds of thousands or even millions of dollars. In such a climate of uncertainty, the self-censorship of speech about abortion providers will be more thorough than any content-based law could ever impose.

Another undefined element of the "poster pattern" is time, with "true threats" being found to have been published up to two and one-half years after the last killing in the "pattern." Pet. App. 9a–11a.

Will the "poster pattern" ever expire? More importantly, how would a speaker know whether it has expired or not? What criteria would a "reasonable person" use to determine the vitality of the "poster pattern"? In truth, there is no way for a speaker to determine whether one year, two years, five years, ten years, or more will be considered sufficient time since the last incident to avoid the perception of a threat. One person might think six

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[14] This same scenario could be played out even if the Ninth Circuit had expressly held that the "poster pattern" applied only to actual paper posters. The next plaintiff could easily (and reasonably) argue that a defendant should not escape liability for publishing "true threats" in another format, e.g., a billboard or picket sign, when "a reasonable person would have known" that the plaintiff would understand that the defendant was only using the alternative format to avoid liability, and that, for all intents and purposes, it was as close to a "threatening" poster as he thought could get away with.

months is reasonable; another might think five years precipitous. Since his fate lies with a jury's post hoc determination as to what was "reasonable," the cautious speaker will keep silent.

B. *The Ninth Circuit's "analysis" of the threatening nature of the Nuremberg Files website is so obscure that a "reasonable man" could not be expected to understand it*

The vagueness of the parameters of the "poster pattern" reaches its zenith in the Ninth Circuit's discussion of the Nuremberg Files website. The Court's reasoning here is simply opaque.

In its first discussion of the website, the Ninth Circuit stated only that it could not say "that it is clear as a matter of law that listing [respondents] on *both* the Nuremberg Files *and* the GUILTY posters is purely protected political expression." Thus, the question of whether it was a "true threat" was for the jury. Pet. App. 33a (original emphasis).

In its conclusion, however, the Court stated, "In conjunction with the 'guilty' posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on a hit list.[15] To this extent only, the Files are also a true threat." Pet. App. 45a.

The Court's use of somewhat disembodied language in discussing the website and the absence of any discussion of the petitioners' intent or what they "should have known" about the effect of the website on the respondents is explained by the fact that the petitioners were in no way responsible for the respondents

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[15] As with the posters, the Ninth Circuit considered only some of the "entire context and . . . all the circumstances" concerning the publication of the website. The court singled out as significant to its "threats" analysis the fact that abortionists listed on the site who had been killed or wounded had their names stricken out or highlighted in grey. Pet. App. 33a. From this, the Court concludes that the respondents would feel threatened by being on a "scorecard" or "hit list." Pet. App. 45a. The court completely disregarded the undisputed testimony of Neal Horsley, creator of the website, that, rather than keeping an updated "scorecard," he had, on a single occasion, copied that information and format from a mainstream online news source and incorporated it into the site. Tr. 2282–85. As discussed in Section I(B), supra, under the objective test for threats, the speaker's more complete knowledge of "all the circumstances" apparently is outweighed by the listener's lack of knowledge of "all the circumstances." Under the objective or negligence standard for speakers, perception trumps reality.

being listed on the website. As set out in the Petition for Writ of Certiorari, that was the work of a non-party, Neal Horsley, who owned, operated, and had sole control over the contents of the website. Pet. at 3.[16] Nevertheless, the Ninth Circuit held that the appearance of the respondents' names on the website constituted a "true threat" against them *by the petitioners*. Thus, apparently the parameters of the "poster pattern" extend not only to making the petitioners' constitutionally protected speech unprotected, but to turning the protected speech of others into "true threats" for which the petitioners are responsible, and for which presumably the second speaker, under the objective test, can also be found liable should he be sued.

Note the snowball effect: Some people publish posters about a number of abortion doctors. Three of the doctors are killed, two by people who did not make those posters, or any other posters as far as the record shows. The petitioners publish posters about other doctors, which posters are then held to be unprotected speech because they are too similar to the posters previously published by other people, about other doctors, followed by murders committed by still other people. Then, a website published by yet another person is held to be unprotected speech to the extent it contains names published by the petitioners on posters which were too similar to posters published by other people followed by murders committed by still other people.

If tomorrow someone were to look at the website, see Dr. Hern's name, and then say to him, "Dr. Hern, someday you're going to be put on trial for your crimes against humanity," would that be unprotected speech if Dr. Hern said he felt threatened by it? Who would be liable? The speaker? Neal Horsley, because the speech was made "in conjunction with" his website which had

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[16] Although the district court purportedly found that Neal Horsley, a non-party, "managed" the Nuremberg Files website as the "agent and co-conspirator" of the petitioners, Pet. App. 177a, the court acknowledged the petitioners' lack of ownership or control over the website by enjoining the petitioners "and their agents" only from "providing additional information" about respondents "to the Nuremberg Files website or any mirror website," or from republishing "personally identifying information" from the website about respondents. Pet. App. 183a. The court did not place any restrictions on the operation of the website, even as to the respondents' "personally identifying information," because it had no jurisdiction over the site or its owner.

been held to be a "true threat" insofar as it listed Dr. Hern? The petitioners, because the speech was made " in conjunction with" the website that was deemed unprotected because it listed names they also listed on their unprotected posters? All of the above?

The place to stop this downward and outward spiral of liability and subversion of First Amendment rights is at the beginning, where the Ninth Circuit applied an erroneous test to the petitioners' speech. The only question should have been: did the petitioners intend their otherwise constitutionally protected speech to be a threat to the respondents? By departing from that question, and entering the thicket of what a "reasonable person would have known" about how speech would be interpreted, the Ninth Circuit has injected a tremendously chilling degree of uncertainty into the exercise of constitutionally protected rights.

Conclusion

This Court has often given voice to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times v. Sullivan*, 376 U.S. at 270; *Watts v. U.S.*, 394 U.S. 705, 707–08 (1969). As Judge Berzon indicated in her dissent, it is precisely the cases which present hard facts which test that commitment. Pet. App. 74a, 102a–03a. These cases test not only our commitment to the principle of freedom of expression, but to the principle of personal responsibility for acts both good and bad. This is seen in the protection this Court has held the First Amendment affords even to those who advocate unlawful acts; only those who actually commit unlawful acts may be punished, because they are solely responsible for their actions. In the United States, we do not recognize a crime or tort of "creating a climate of violence" or "contributing to a climate of violence" or "failing to dissociate oneself from violence." People are held responsible for their own actions, not those of others.

The petitioners here did not kill anyone. They did not threaten to kill or harm anyone. They spoke their minds *publicly*, in terms which were "clearly, indubitably, and quintessentially" protected under the First Amendment, on one of the most vital and contentious topics of our day. They cannot be held liable and have

their speech proscribed because "a reasonable person" would have known that the subject of their critical speech would take it as a threat, because of a "context" over which the speakers had no control.

The Court should grant this petition to reaffirm our national commitment to *public* debate on *public* issues that is "uninhibited, robust, and wide-open," rather than chilled and stifled by concern that, down the road, a jury or a bare majority of judges may determine that a reasonable person would have known better than to say that.

Respectfully submitted,

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Appendix

[filed December 13, 1999]

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

FLORIDA NATIONAL ORGANIZATION FOR WOMEN, INC., SOUTH PALM BEACH COUNTY CHAPTER NATIONAL ORGANIZATION FOR WOMEN, INC., CONGREGATION L'DOR VA-DOR, REVEREND MATTHEW ANDERSON and CHARLOTTE DANCIU, ESQ.

Plaintiffs,

vs.

STATE OF FLORIDA, ROBERT BUTTERWORTH, in his official capacity as Attorney General for the State of Florida, FRED DICKINSON, in his official capacity as Executive Director of the FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES and the DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES.

Defendants.

CASE NO.: CL-9911655 AD

AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT AND FOR
TEMPORARY AND PERMANENT INJUNCTION

[. . .]

18. "Choose Life" is a quotation from Deuteronomy, 30:19, which is the 5th book of the Bible. The Bible is considered by certain religious groups, including those who inspired, supported

and sponsored this legislation, as the revealed word of G-d, and/or the sacred text of their religion. As originally used in the book of Deuteronomy, the phrase "Choose Life" had nothing to do with abortion, but has been taken out of context and distorted by some to promote their own particular religious and/or political beliefs surrounding abortion.

19. By enacting this law, the State of Florida not only supports, but also endorses the "Choose Life" motto, which stands to promote a religious and/or political point of view and is not secular in purpose. Alternatively, this motto is so pervasively sectarian that any secular meaning cannot be separated from any sectarian meaning. This millenium [sic] has been characterized by far too many instances of misguided zealots misusing and distorting the Bible in order to further an effort to restrict, limit and deny the basic rights of others. Unfortunately our nation has not been spared from such misguided efforts. This misuse of the Bible prompted those who crafted the laws of this State to create a wall of separation between Church and State, which is now reflected in the Florida Constitution. Plaintiffs, CONGREGATION L'DOR VA-DOR and REVEREND MATTHEW ANDERSON believe it would not enhance but cause harm to religion and our state to begin the new millenium [sic] by co-opting the State of Florida to further misuse the Bible in a misguided effort to discourage women from exercising their basic rights.

20. In addition, with this law the State of Florida supports and endorses a motto which advances religion because of its inherently religious meaning. As previously stated, "Choose Life" originates from the Bible and has been the rallying cry of certain religious organizations in their campaign to limit, restrict and/or eliminate abortion.

21. In addition to its use as a slogan to promote a religious view, the phrase "Choose Life" has also been used as the rallying cry of the so-called Pro-Life movement, which has frequently resorted to illegal, vigilante and at times lethal tactics in their effort to prevent women from exercising their right as Floridians to choose abortion. By placing the motto "Choose Life" on license plates in this state, the State of Florida has chosen to support, promote and give "license" to the ideas and activities of a movement which does not believe in the principle of the separation of

Church and State and which has at times threatened and endangered the life, health and well being of the people of Florida and has often resorted to illegal tactics including theft, vandalism, extortion, death threats, bodily injury and/or murder to accomplish its goals. The slogan "Choose Life" is so intertwined with the so-called Pro-Life movement that the issuance of the "Choose Life" license plate by the State of Florida will create the impression in the minds of the public as well as solid evidence that the State of Florida has been co-opted by the so-called Pro-Life movement, which will further encourage and confer an air of legitimacy to activities which are often illegal and dangerous to the people of Florida. This state endorsement of a motto, which appears innocuous but has been used by those who threaten the property, health and the lives of others, represents a clear and present danger to the people of this state.

22. By creating this license plate, the State of Florida has placed its imprimatur upon a religious motto which has frequently been used to harass, intimidate and at times kill and maim those who seek to exercise their rights, including the right to choose abortion, which is considered one of the most fundamental human rights that a person can possess according to the Supreme Court of Florida.

23. The term "Choose Life" is employed by those who oppose the right of the women of Florida to exercise their right to choose abortion. This slogan is used in order to demonize those who believe in the right to choose abortion and is meant to infer [sic] that those who disagree with their views do not believe in choosing life but rather choose death. By adopting this terminology, those who oppose abortion have created a climate in which doctors who perform abortions, women who seek abortions, and all those who protect abortion rights are considered murderers and accomplices to murder and are thus fair game and legitimate targets for theft, vandalism, death threats, and murder.

[. . .]

Supreme Court, U.S.
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No. 02-563

In the

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATUTES

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As an initial matter, petitioners point out some of the misrepresentations in respondents' brief ("OB."):[1]

First, respondents represent that Paul Hill, who killed Dr. Britton, was "closely-tied to petitioners." OB. 2. As the district court instructed the jury (without objection by respodents): "there is *no connection* per se between the killers of—the murders [sic], *Hill*, Salvi, et cetera, and the defendants. They are not in the same organizations and *they are unconnected*." Tr. 768.

Second, respondents represent that "the Nuremberg Files contained Physicians' [i.e., respondents] names, addresses, and family information." OB. 4. The website contains *no* "addresses and family information" for *any* respondent.[2] L.19-20, 26, 37-38.

Third, respondents represent that Judge Kozinski's dissent "acknowledged that the 'majority cite[d] evidence supporting the finding that the two wanted posters prepared by defendants constituted a true threat.'" OB. 27. Respondents' cropped quotation is part of a passage in which Judge Kozinski stated the *opposite* of what they represent: "its [the majority's] opinion *fails* to come up with *any proof* that defendants communicated an intent to inflict bodily harm upon plaintiffs." Pet. App. 54a-55a.

And, fourth, respondents claim *United States v. Khorrami*, 895 F.2d 1186 (7th Cir. 1990), found "wanted" posters to be true threats. OB. 12. In truth, the threat resided in the *specific content* of the *mailed* posters, including explicit references to deadly force ("*Execute* Now!" "Must be *Killed*"). *Id.* at 1189, 1193.

Beyond such misrepresentations, respondents' brief concedes each core constitutional fact, while avoiding any significant discussion of the major First Amendment issues presented. Respondents stake their entire position on the argument that this

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[1] Petitioners will be referred to collectively as ACLA. Unless otherwise noted, all emphasis in this brief is added.

[2] The Files contain business information respondent Hern publishes on his website, www.drhern.com. L.26. Respondents also claim that the Files feature "dripping blood," as if to suggest it is the blood of killed or wounded doctors. OB. 3. The animated graphic of dripping blood depicts blood flowing from the tiny limbs of aborted babies. L.15; www.christiangallery.com/atrocity.

case is "factbound," but fail to demonstrate the existence of any *disputed* fact that would impair consideration of the First Amendment question de novo.[3] *E.g., Bose Corp. v. Consumers Union*, 466 U.S. 485, 499-511 (1984). Furthermore, every First Amendment case in which this Court has reversed a jury verdict or bench decision has been "factbound." As this Court has taught, "[T]he reaches of the First Amendment are ultimately defined by the *facts* it is held to embrace, and we must thus *decide for ourselves* whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 567-68 (1995). Under respondents' "factbound" theory, this Court would not have reviewed the "factbound" result in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), which ought to control this case.[4]

A. Respondents Concede National Importance and Impact.

Respondents do not dispute any of these points:

First, the majority has converted all posters condemning named abortion doctors into potential RICO and FACE violations, since "wanted-style" is not defined and the majority declares that "differences in caption or words are immaterial." Pet. 9.

Second, the majority's decision permits a speaker's political opponent to define a "threat" merely by professing to be afraid of a speaker's statement in a "context" that includes violent acts of non-parties for which the speaker is not responsible—even if the speaker's statements *are devoid of threatening language*. Pet. 20-21; Life Legal Amicus Br. at 2-13; deParrie Amicus Br. at 2-12.[5]

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[3] The only fact respondents dispute is that the aggregate verdict is $120 million. OB. 5 n.7. It is actually slightly more than that. Pet. App. 46a n.4.

[4] Respondents suggest that this Court not issue a writ because there is no final judgment. OB.6 n.10. This Court may review decisions from federal appellate courts *before* rendition of judgment. 28 U.S.C. § 1254. Further, the First Amendment question is final despite any remand for a pointless recalculation of punitive damages. *See Claiborne*, 458 U.S. at 907 n.42.

[5] In a case where "context" is supposedly crucial, respondents ironically cite a few out-of-context statements from a 3,000 page trial record. OB. 13 n.17. For example, petitioner Bray's remark that a poster made a non-party doctor "bothered and afraid" hardly deprives posters of First Amendment protection.

Third, the majority's attenuated notion of "threat" and its refusal to follow *Claiborne* will be cited in other suits brought to crush political opponents with RICO and FACE claims.[6] Pet. 20.

And, fourth, as the five dissenters warn, the "logic" behind the "poster pattern" theory will be applied to create actionable "patterns" between all manner of facially non-threatening speech and subsequent violence, thus silencing other forms of political expression. Pet. 21; Pet. App. 69a, 102a-103a.

Respondents' concessions only confirm that the majority's decision is "contrary to the *principles* of the First Amendment as explicated...in *Claiborne*...and...*Brandenburg*...." Pet. App. 69a (Kozinski, J., dissenting); S. Ct. R. 10. This is also a case where a circuit court "has decided an important question of federal law that has not been, but should be, settled by this Court"—namely, the appropriate standard for determining the existence of a "threat" in political speech punished under FACE and RICO. S. Ct. R. 10.

B. Respondents Concede That The Majority's Decision Rests Entirely On A Fictitious "Poster Pattern."

Respondents fail to address, and thereby concede, that the majority's "true threat analysis turns on" a non-existent "poster pattern." Pet. App. 39a. Although the majority claimed to have conducted an "independent review" of the record, *id.*, it failed to acknowledge undisputed facts that undercut its entire theory. *Respondents have conceded every one of these undisputed facts*, as to which the jury was not asked to make, and did not make, any finding to the contrary: (1). *Hundreds* of protest posters

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The *Life Advocate* article merely notes (as did the mass media) that Gunn's murder caused other doctors to be afraid. This has nothing to do with posters being "death treats." Regarding the cropped quotation from petitioner Burnett's testimony, in context Burnett testified "I would have to *speculate*" whether publication of personal information about doctors would "*enhance*" their fear of future non-party violence—a mere incitement theory. Tr. 954.

[6] With regard to the non-existent FACE conspiracy claim, respondents state merely that the error is "waived," failing to address the point that subject matter jurisdiction is non-waivable, and that there was no subject matter jurisdiction to try a cause of action that FACE does not contain. OB. 7 n.11; Pet. 26 n.11; *see* Am. Fam. Ass'n Amicus Br. at 2, 13-14.

condemning abortion doctors have circulated for years without subsequent violence. Pet. 8; *see also* deParrie Amicus Br. and Lodging (containing pro-life and political posters); (2). Dr. Patterson was reportedly killed in a *robbery attempt* and there is *no evidence* that his death related to anti-abortion activity. Pet. 8; and (3). the majority's alleged "poster pattern" thus consists of *two* (not three) known acts of anti-abortion violence against doctors named in posters out of *hundreds* of posters circulating. These *undisputed* facts demolish the "poster pattern," without which the only stated basis for affirmance—as unconstitutional as it is—vanishes.

But, *it would not matter even if the poster pattern existed*, since "patterns" cannot extinguish the right to use certain modes of political expression. *This case is not a factual debate over a "poster pattern."*

Further, respondents do not deny that after the "poster pattern" supposedly emerged, the Oregon Court of Appeals ruled that posters condemning named Portland-area abortion doctors, circulated by petitioner AFLM and amicus deParrie, were *not threats* but protected speech. Pet. 16 n.8; deParrie Amicus Br. at 2, 14-16. Hence, ACLA is supposed to have "foreseen" a "threat" where the Oregon Court of Appeals saw only protected speech.

C. Respondents Concede That The Majority Sua Sponte Changed The First Amendment Rules After Trial.

Respondents fail to address, and therefore concede, the following:

Conceded: The majority *sua sponte* created a new, limited theory of liability by which the jury was not bound: that *only* the undefined "wanted-style" *format* of ALCA's posters, not their language, and only the website's "scorecard" of doctors—read in "conjunction with" the poster "format"—were unprotected speech.[7] Pet. 25.

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[7] Respondents claim the majority held ACLA liable not for the "format" of its posters, but for ACLA's "threatening message." OB. 13. The majority contradicts respondents: "[T]he *language* itself is not what is threatening...it is use of the 'wanted'-type *format* in the context of the poster pattern...that constitutes the threat." Pet. App. 39a. Respondents repeatedly refer to ACLA's

Conceded: The district court did not limit the jury to this theory in its instructions. In fact, the theory that only the "wanted-style" format of the posters and the "scorecard" were unprotected *was never raised at any stage of the proceedings below.*[8] Pet. 25.

Conceded: The district court permitted the jury to parse and punish *any aspect* of the posters and website, including their many statements, and petitioners' counsel *urged them to do so.* Pet. 25.

Conceded: A general verdict cannot stand on appeal if one of its possible bases is illegal. *See Griffin v. United States*, 502 U.S. 46 (1991). Pet. 26.

Conceded: The jury was free to punish elements of the communications even the majority declares legally protected, Pet. 23, 25-26; OB. App. 75a-91a, whereas the injunction manifestly punishes speech the majority says is not punishable, including the whole website and the content of the posters or their mysterious "equivalent." Pet. 23, 25-26.

Thus, there is no real dispute that petitioners were tried under one set of First Amendment rules, while the verdict and injunction were affirmed under another.

D. Respondents Fail To Distinguish Controlling Precedent.

Concerning the majority's departure from *Brandenburg v. Ohio*, 395 U.S. 444 (1969), respondents miss the point. ACLA was held liable because, according to the majority, the "poster

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"threatening message," but fail to indicate which statements convey the "threatening message." Respondents cannot do so because, as the majority conceded, the *content* of ACLA's posters is protected.

[8] Contrary to respondents' contention, ACLA does not argue that the "poster pattern" theory was first raised on appeal, but rather that liability was first *limited* to that theory on appeal. OB.13 n.18; Pet. 11-12. As respondents now concede, the theories of liability at the trial level merely "included," OB.13 n.18, *but were by no means limited to*, the "poster pattern." At any rate, limitation of liability merely to the *format* of the posters in the "poster pattern" was never raised below, not even as one of several alternative theories. Also, respondents do not deny that non-party Neal Horsley created the so-called "scorecard" in the Nuremberg Files solely on his own, *after* ACLA's name had been removed from his website. Tr. 2251-59. In any case, the "scorecard" is just as protected as ACLA's posters. Pet. App. 69a-70a n.3, 130a n.14.

pattern" "generated fear" of violence and made respondents "seriously worried about being next in line to be shot and killed," Pet. App. 41a, which, of course, never happened. It mattered not to the majority *who* might do violence or *when*, if ever, violence would occur. Pet. 16. Since it is conceded that ACLA did not incite violence, ACLA cannot be held liable for making respondents "worried" about violence in the indefinite future. This is nothing but an unconstitutionally attenuated incitement claim, which the label "threat" cannot conceal.[9]

Respondents wrongly claim that *Claiborne* does not control the outcome of this case. Pet. 16-20. Respondents "distinguish" *Claiborne* on the basis that white merchants, not the blacks whom Evers coerced to observe the boycott, brought the action. OB. 23-26. But *Claiborne* held that the white merchants *could* sue for losses caused directly by violence *and threats of violence* by Evers and the NAACP. 458 U.S. at 916-18. It was precisely because Evers's statements *did not constitute actionable threats against black customers* that this Court struck down the injunction and damage award—after conducting what respondents would contend was inappropriate review of a "factbound" result.

To conclude that *Claiborne* does not control, one would have to reason that Evers's threatening public statements *were not* "true threats" merely because Evers did not name anyone in the small town where he spoke, although boycott-breakers were identified at NAACP meetings and in the "Black Times," whereas petitioners' public statements to a national audience *are* "true threats" merely because petitioners identified respondents (and many others) *without threatening anything*. That conclusion is ludicrous.[10]

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[9] The majority abandoned the key distinction taught in *Brandenburg*, and reinforced in *Claiborne*, between speech that makes people fearful and speech that imminently incites or threatens violence. *Claiborne*, 458 U.S. at 927-98. Respondents essentially concede that this case is not about "threats" but "intimidation," which is a broader concept than "threats." *E.g.*, OB. 4 ("petitioners intended to intimidate"), 7 ("intent to intimidate"), & 17 (same).

[10] Respondents state the *Claiborne* defendants had not actually broken anyone's necks, as Evers had threatened. OB. 24. But petitioners likewise had not committed any violence; this "distinction" only helps petitioners.

Respondents attempt to explain away the conflict between the majority's decision and *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), by noting that *Ashcroft* did not involve threats. OB. 26. Respondents ignore the governing legal principle of *Ashcroft*: that for speech to be punished there must be more than a remote connection between the speech and unlawful acts. 122 S.Ct. at 1403. Ignoring *Ashcroft*, the majority adopted an unheard-of *post hoc ergo propter hoc* theory that a certain "style" of poster "resulted in the death of three doctors." Pet. App. 41a. But there is not even a remote connection between posters and violence.

E. Respondents Fail To Explain Away Circuit Conflicts.

Rejecting the de novo review of the three-judge panel, which decided for itself whether the communications were threats, Pet. App. 121a-122a, the majority devised a different review standard for threats cases because, according to the majority, "It is not easy to discern a rule...that can easily be applied in a threats case...." Pet. App. 19a. Respondents *do not deny* that no other circuit has created a special review standard in threats cases. Nor do they deny that the Eighth Circuit has recently conducted de novo review of the core First Amendment question and related facts in an *explicit* threat case, without creating any special standard of review. Pet. 29; *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 621 (8th Cir. 2002) (en banc). As the majority explained its new standard of First Amendment review, however, "The task in this case does not seem dramatically different from determining that the issue should have gone to the jury and that the jury was properly instructed under FACE." Pet. App. 39a. That is *not* the First Amendment de novo review other circuit courts conduct in obedience to this Court. Pet. 27-30.

Respondents also claim petitioners were violent because *some* had signed petitions that a non-party's *past* use of force to protect unborn children could be legally justified in criminal proceedings. OB. 25 n.31. The petitions did not call for *future* violence. Even if they did, advocacy of violence as morally justified is protected and cannot convert ACLA's protected posters, which say *nothing* about violence, into unprotected "threats." *Claiborne*, 458 U.S. at 927-28.

Contrary to respondents' suggestion that the dissenters *approved* the majority's standard of review, OB. 27, the dissenters *objected* that the majority had indulged in "broad and uncritical deference to the judgment of a jury." Pet. App. 69a. Such deference avoids the constitutional duty to approach liability for public forum speech with "extreme care." *Claiborne*, 458 U.S. at 926-27. As the dissenters note, "This is precisely what the majority does *not* do; were it to do so, it would have no choice but to reverse." Pet. App. 58a. Indeed, as we note above, the majority did not even follow its own new standard, under which it professed to accept all undisputed facts as true. Pet. App. 20a, 54a-55a. Had it done so, it would have been forced to acknowledge that the "poster pattern" was a mere invention.

Concerning the Ninth Circuit's conflict with the Second Circuit on what constitutes an actionable threat, *see United States v. Kelner*, 534 F.2d 1020 (2nd Cir. 1976), respondents argue irrelevantly that both circuits consider "context" and apply an "objective" standard of intent. OB. 18-19. The real issue is that the two circuits apply a completely different First Amendment test for the *content* of an actionable threat. Under *Kelner*, ACLA's posters would not be actionable unless "on [their] face and in the circumstances [they are] so unequivocal, *unconditional, immediate and specific* as to the person threatened, as to convey a gravity of purpose and *imminent prospect* of execution." 534 F.2d at 1027. Under the majority's standard, *any statement whatsoever*—even a certain poster "format," exhibiting a certain "style"—can be tried as a threat under FACE, so long as it was "foreseeable" that the political opposition would feel threatened.

F. Respondents' Concede That The Injunction Contradicts And Undermines The Very Basis Of The Verdict.

Respondents speculate that the jury, as well as the judge, found specific intent to "intimidate."[11] OB. 15-16. But the jury was

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[11] Respondents' brief, like the majority opinion, persistently conflates intent to *intimidate* with intent to *threaten* bodily injury. *See, e.g.*, OB. 17. The two are not the same. Respondents never address petitioners' point that FACE requires, not mere intimidation, but intimidation *by* threat of force, and that

instructed to impose liability "even if you believe that defendants *did not intend* the statements to be threatening," so long as a "reasonable" speaker would *foresee* that the posters would be "interpreted" as threats—a negligence standard. Pet. App. 251a. Yet, the district court issued a FACE injunction that would punish the communications *only* if they are republished with specific intent to threaten. Pet. App. 181a-184a. Consequently, the injunction *authorizes further threats* under the very "objective" standard respondents defend. *Respondents do not deny this.*

Amazingly enough, respondents even praise the injunction's specific intent standard as a "careful effort[] to tailor the injunction to prohibit no more speech than necessary." OB. 17. Why, then, was the jury not also required to punish "no more speech than necessary"—i.e., only speech specifically intended as a threat? Here, respondents virtually stipulate to a reversal.[12]

None of this is to suggest that the injunction is anything but unconstitutional. Respondents dismiss the applicability of the prior restraint doctrine with a citation to *Madsen v. Women's Health Center*, 512 U.S. 753 (1994). OB. 18. But *Madsen* dealt with conduct, not pure speech in the form of posters. 512 U.S. at 763 n.2. Unlike *Madsen*, the injunction here is expressly content-based. Pet. App. 181a-184a. Further, the injunction's ban on possession of "materials" in petitioners' homes contradicts *Stanley*

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because the district court defined "threat" according to a negligence standard, the FACE "intimidation" instruction hinged on that negligence standard, as Judge Berzon noted. Pet. 21-23; Pet. App. 105a-106a.

[12] Respondents declare that no court of appeals endorses a specific intent standard. OB. 15-16. They fail to mention that *the Ninth Circuit itself* has held that private party claims under federal threat statutes require a showing of specific intent to threaten. Pet. 23 n.9 (citing *Twine* and *Hanna*). Respondents also raise the specter of "clever threateners" evading liability under a specific intent standard, OB. 16; but that standard involves nothing more than proof of mens rea. Besides, respondents *defend* the specific intent standard of the injunction! OB. 17. The real danger posed by this case is that "clever plaintiffs" can use the "reasonable man" standard to convert protected political speech into "threats"—precisely as happened here. *See* Life Legal Amicus Br. at 2-9

v. Georgia, 394 U.S. 557, 565 (1969). Pet. 30; Pet. App. 106a-107a n.10. Respondents fail to address this point.

G. Respondents' Discussion of "Context" is Irrelevant.

Respondents expend a great portion of their brief discussing the role of "context" evidence in "*true* threat" cases. OB. 8-14. No one disputes that context can help determine whether a given statement—e.g., "You will sleep with the fishes"—is a threat. The problem plaintiffs never address is that in this case (unlike any other) there *was no threatening statement*, but only a "format" and a "style" deemed *threatening* because of an alleged "pattern."

H. Respondents' Misunderstand the Vagueness Problem.

Finally, respondents miss the point of ACLA's vagueness argument. OB. 21. It is not FACE, but the majority's forbidden "wanted-style format" and the seemingly eternal "poster pattern" that are vague, leaving anti-abortion speakers to guess whether posters or "equivalent" statements condemning doctors would violate FACE and RICO.[13] The majority's theory renders the statutes unconstitutional *as applied* to "wanted-style posters" or their "equivalent." Pet. 8-9, 14-15; *see also* Am. Fam. Amicus Br. at 4; Life Legal Amicus Br. at 13-19; deParrie Amicus Br. at 9-12.

Thus, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[13] Amicus Life Legal Defense Foundation rightly asks: "Will the 'poster pattern' ever expire? More importantly, how would a speaker ever know whether it has expired or not?" Life Legal Amicus Br. at 16.

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No. 02-563

In the Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL., PETITIONERS

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether petitioners' communications—two posters and a portion of a website—are protected expression under the First Amendment.

2. Whether a public communication that contains no explicit threat can be deemed a "true threat" under the First Amendment because the communication is comparable in content and format to earlier communications by third parties that preceded killings of persons identified in those communications, and a person who made the instant communication would consequently have reasonably foreseen that it would cause the persons named in it to fear for their safety.

3. Whether a website that lists the names of abortion providers, with markings indicating which of those individuals have been killed or wounded, may constitute a "true threat" under the First Amendment.

4. Whether the court of appeals affirmed the jury's liability finding and compensatory damages award based on a theory on which the jury was not instructed.

5. Whether the court of appeals upheld a damages award for public speech based on a negligence standard.

6. Whether the court of appeals applied the correct standard of appellate review in determining whether petitioners' statements were "true threats" under the First Amendment.

7. Whether the district court's injunction is an impermissible restraint on free speech.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioners challenge a damages award and injunction entered against them in a civil action under the Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), 18 U.S.C. 248, which proscribes, *inter alia*, "intentionally * * * intimidat[ing] or interfer[ing] with" a person by "threat of force" because the person is "providing reproductive health services." Petitioners contend that the communications that formed the basis for the judgment against them are

political advocacy protected by the First Amendment. The court of appeals held that those comunications are "true threats," which the First Amendment does not protect. In so holding, the court applied a legal standard for distinguishing "true threats" from protected speech that is correct and consistent with this Court's decisions. This case does not, therefore, warrant the Court's review.

1. Petitioners are abortion opponents who published various documents targeting physicians who perform abortions. In January 1995, at a press conference in Washington, D.C., petitioner American Coalition of Life Activists (ACLA) unveiled a poster captioned "GUILTY OF CRIMES AGAINST HUMANITY." Pet. App. 10a. Under the heading "THE DEADLY DOZEN," the poster identified 13 physicians who provided abortions, including three of the respondents, and offered a reward "for information leading to arrest, conviction and revocation of license to practice medicine." *Id.* at 10a-11a. The poster listed the home addresses of some of the physicians. *Ibid.* The day after the poster was released, the FBI offered protection to the physicians identified on the poster and advised them to take security precautions. *Id.* at 11a. The poster was reprinted in a magazine and a newsletter published by petitioners and was displayed at other ACLA events. *Ibid.*

Later that year, ACLA unveiled six posters at an event in St. Louis, including one directed at respondent Dr. Robert Crist. Pet. App. 11a. The Crist poster, captioned "GUILTY OF CRIMES AGAINST HUMANITY," contained Crist's photograph and his work and home addresses, and stated, "Please write, leaflet or picket his neighborhood to expose his blood guilt." *Id.* at 11a, 116a. The poster offered a reward "to any

ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines." *Id.* at 11a. The poster had "Abortionist" in large bold type at the bottom. *Ibid.*

In January 1996, in connection with an event honoring individuals incarcerated for anti-abortion violence, petitioners released the "Nuremberg Files," a collection of information about approximately 200 abortion providers (including four of the respondents) and approximately 200 others identified as abortion supporters, including judges (among them six current or former Members of this Court), politicians, and abortion-rights activists. Pet. App. 11a, 193a; Lodging 37-41. ACLA stated that the names, photographs, and addresses of individuals were being collected in order to hold trials in "perfectly legal courts once the tide of this nation's opinion turns against the wanton slaughter of God's children." Pet. App. 116a-117a. Petitioners gave the Nuremberg Files to an anti-abortion activist, who posted them on an internet website. *Id.* at 11a. On the website, the names of physicians who had been murdered were crossed out, the names of physicians who had been wounded were printed in gray type, and the names of physicians continuing to perform abortions were printed in black type. A legend explained the meaning of those distinctions. *Id.* at 11a-12a, 32a-33a, 125a n.2, 138a; Lodging 19-25.

Neither the posters nor the Nuremberg Files contained any explicitly threatening language. Pet. App. 39a, 54a, 190a. The physicians who were the subjects of the posters and the Nuremberg Files nonetheless feared for their safety, because the personal information and photographs made them easily identifiable and because three other physicians had recently been killed after they were identified in similar posters. *Id.* at 32a,

222a-223a. In 1993, Dr. David Gunn, a physician who previously had appeared on "WANTED" and "unWANTED" posters containing his name, address, and photograph, was shot and killed by an abortion opponent. *Id.* at 9a. In 1994, Dr. John Bayard Britton was murdered by an abortion opponent, Paul Hill, who had helped to make "unWANTED" posters containing Dr. Britton's home and work addresses and photograph. *Id.* at 9a, 141a-142a. Dr. George Patterson, a third physician who had appeared on a "WANTED" poster, was shot and killed in 1993, although the motive for the killing is unknown. *Id.* at 9a, 55a.[1]

Petitioners were aware of the fear that the posters generated among physicians who appeared on them. For example, petitioner Charles Wysong stated that one of the "two things" that physicians who quit performing abortions "feared the most" was "having their picture put on a poster." Pet. App. 12a. Petitioner Michael Bray stated that a physician who quit performing abortions after having appeared on a "Not Wanted" poster did so because he was "bothered and afraid." *Ibid.* And petitioner Andrew Burnett stated, with respect to the impact of "Wanted" and "Guilty" posters, "if I was an abortionist, I would be afraid." *Ibid.*

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[1] After the killing of Dr. Gunn, petitioner Michael Bray and Paul Hill prepared a petition urging the killer's acquittal on justifiable homicide grounds, which was joined by seven other individual petitioners and petitioner ALM. Pet. App. 9a, 140a-141a. After the killing of Dr. Britton, six individual petitioners and ALM signed a similar petition calling for the killer's acquittal. *Id.* at 9a-10a, 142a. When Hill was convicted of the killing, petitioner ALM praised Hill and encouraged others to emulate him as a "hero." *Id.* at 142a.

2. Respondents filed suit alleging, *inter alia*, that the posters and Nuremberg Files were unlawful threats of force under the FACE Act, 18 U.S.C. 248. Pet. App. 6a-7a. The FACE Act provides civil remedies as well as criminal penalties against anyone who

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C. 248(a)(1).

At the end of trial, the district court instructed the jury that, in order to find petitioners liable under the FACE Act, it would have to find (1) that the Deadly Dozen poster, the Crist poster, or the Nuremberg Files list was a "true threat" such that "a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault" (Pet. App. 33a), and (2) that each petitioner made a true threat "to intimidate or interfere with" respondents or other persons because they were providing reproductive health services (1/26/99 Tr. 19).

The jury found petitioners liable and awarded $526,336 in compensatory damages against each petitioner and a total of $108.5 million in punitive damages on the FACE Act claims. Pet. App. 7a, 46a n.4. The district court entered an injunction prohibiting petitioners from distributing or reproducing certain materials, including the Deadly Dozen and Crist posters, with the specific intent to threaten the respondents. The injunction also required petitioners to turn over all

copies of those materials in their possession, except that their attorneys were permitted to retain one copy of any item in the record. *Id.* at 13a, 43a, 181a-183a.

3. A panel of the Ninth Circuit vacated the judgment, concluding that the two posters and the Nuremberg files were not true threats. Pet. App. 116a-125a.

4. The Ninth Circuit reheard the case en banc and affirmed the judgment of liability, the compensatory damages award, and the injunction, but remanded for a determination whether the punitive damages award comported with due process. Pet. App. 6a-52a.

The court explained that the First Amendment distinguishes between advocacy of violence, which is protected, and true threats of violence, which are not protected. Pet. App. 22a. The court defined a true threat as "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person." *Id.* at 28a. The court declined to incorporate into that definition a requirement that the speaker act with the specific intent to threaten, noting that such a requirement "is subsumed within the statutory standard of FACE itself, which requires that the threat of force be made with the intent to intimidate." *Id.* at 27a. The court also rejected the argument that "threatening speech made in public is entitled to heightened constitutional protection." *Id.* at 28a.

The court then concluded, based on its "independent[]" review of the record, that the Deadly Dozen poster, the Crist poster, and the Nuremberg Files "scorecard" were true threats when viewed in context. Pet. App. 39a-43a. The court noted that, by the time petitioners published the Deadly Dozen and Crist

posters, "the poster format itself had acquired currency as a death threat for abortion providers," because "Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released." *Id.* at 32a. The court found that the posters sent the message to abortion providers that "You're Wanted or You're Guilty; You'll be shot or killed," and that the message "was reinforced by the scorecard in the Nuremberg Files" noting which physicians had been killed or wounded. *Id.* at 40a. The court also found that petitioners were aware of the "fear of serious harm" generated among abortion providers who were "singled out for identification on a 'wanted'-type poster," and that petitioners "deliberately identified" the respondent physicians on such posters "to intimidate them." *Id.* at 32a, 39a-40a.

Finally, the court upheld the injunction. Pet. App. 43a-44a. The court rejected petitioners' challenge to the prohibition against possessing the Deadly Dozen poster and the Crist poster, reasoning that "[t]he First Amendment interest in retaining possession of the threatening posters is *de minimis*, while ACLA's continued possession of them constitutes part of the threat." *Id.* at 43a.

5. Judge Kozinski, Judge Berzon, and Judge Reinhardt filed separate dissents.

Judge Kozinski (joined by Judges Reinhardt, O'Scannlain, Kleinfeld, and Berzon) agreed with the majority's definition of a true threat, but disagreed that the definition was satisfied on the record of this case. Pet. App. 53a. He understood that definition to require that a true threat "send the message that the speakers themselves—or individuals acting in concert with them—will engage in physical violence." *Id.* at 56a.

Surveying the evidence, he concluded that petitioners' posters were protected expression because, at most, they could be viewed as "a call to arms for *other* abortion protesters to harm plaintiffs." *Id.* at 57a.

Judge Berzon (joined by Judges Reinhardt, Kozinski, and Kleinfeld) argued that a statement made "in the public protest context" amounts to a true threat only when the speaker subjectively intends to communicate an unequivocal threat and the statement is reasonably understood as an unequivocal threat. Pet. App. 82a-85a. She concluded that petitioners' statements were not so unequivocal as to satisfy that standard. *Id.* at 87a.

Judge Reinhardt took issue with the majority's refusal to distinguish between public and private threats. He argued that greater First Amendment protection should be accorded to threats made "in a political forum on issues of public concern" than to "[p]rivate threats delivered one-on-one." Pet. App. 52a.

DISCUSSION

The court of appeals articulated a First Amendment standard that correctly distinguishes between protected advocacy and unprotected threats. The court's definition of a "true threat"—a communication that a reasonable speaker would foresee would be understood as a serious expression of intent to inflict bodily harm—accords with the definition applied by other courts of appeals under various federal statutes. The United States advances that same standard in its criminal threats prosecutions.

The court of appeals did not adopt a "novel notion of actionable threats" (Pet. 12) in concluding that petitioners' posters were proscribable not because of the particular words that they used, but because of their

"wanted-style" format, which "had acquired currency as a death threat for abortion providers." Pet. App. 32a. To the contrary, the court adhered to the settled practice, reflected in this Court's decisions, of considering the entire context in which a communication is made in order to determine whether it is a true threat. The circumstances surrounding the issuance of petitioners' posters notably included the three recent murders of other abortion providers who had been the subjects of similar "wanted-style" posters. It was entirely appropriate for the court to consider whether a reasonable speaker would foresee that the posters, in that context, would be understood by the abortion providers named in them as a serious threat of bodily harm.

This case is not a suitable vehicle to address the other principal question presented by petitioners: whether, contrary to the uniform approach of the courts of appeals, the definition of a true threat should include a subjective as well as an objective component. The court of appeals' refusal to incorporate into its true threats standard a requirement that the speaker intended to make a threat could not have affected the outcome of this case. The FACE Act, the statute under which petitioners were held liable for their threats, requires that the defendant act with the intent to injure, intimidate, or interfere with a person, and the jury was instructed in accordance with that requirement.

Nor do petitioners identify any other question of general importance presented by this case. And, although reasonable judges could (and did) disagree about whether the definition of a true threat was satisfied on the record here, such disagreements do not merit this Court's review. The petition should, therefore, be denied.

1. The First Amendment does not protect "threats of violence," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992), to the extent that they constitute "true" threats. *Watts* v. *United States*, 394 U.S. 705, 707-708 (1969) (per curiam). A true threat is a statement that "communicate[s] a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia* v. *Black*, 123 S. Ct. 1536, 1548 (2003). Such threats are proscribable, notwithstanding any possible political content, in order to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388.

Context is crucial in determining whether a true threat has been made. The particular language used is not dispositive. Thus, the Court has recognized that "veiled threats" as well as explicit threats may constitutionally be proscribed. *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 773 (1994). The Court has also recognized that true threats may take the form of expressive conduct such as cross burning. *Black*, 123 S. Ct. at 1549. Conversely, a statement that contains explicitly threatening language may, in context, be understood to be mere "political hyperbole." *Watts*, 394 U.S. at 708; cf. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982).

b. The court of appeals recognized that neither the Deadly Dozen poster, the Crist poster, nor the Nuremberg Files list "contains any language that is overtly threatening." Pet. App. 39a. The court also recognized, however, that a communication that is not threatening on its face may, in context, be understood as a true threat. Accordingly, the court applied a standard that considered whether a reasonable person, "in the entire

context and under all the circumstances," would foresee that the posters and list would be interpreted by respondents "as a serious expression of intent to inflict bodily harm upon [them]." *Id.* at 28a.

The court of appeals stated the correct legal standard, which is consistent with the position that the government takes in its prosecutions under various threats statutes.[2] Judge Kozinski's dissenting opinion, which was joined by all of the dissenting judges on the court of appeals, acknowledged that the standard articulated by the majority was "correct[]." Pet. App. 53a.[3]

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[2] See, *e.g.*, Gov't Br. in Opp. at 4, *Morales* v. *United States*, No. 01-8544; Gov't Br. in Opp. at 4, *Ogren* v. *United States*, No. 01-190; Gov't Br. in Opp. at 4, *Murillo* v. *United States*, No. 00-7592; Gov't Br. in Opp. at 4, *Viefhaus* v. *United States*, No. 98-8689; see also *Rogers* v. *United States*, 422 U.S. 35, 46-47 (1975) (Marshall, J., concurring) (describing government's position).

[3] Judge Kozinski's dissent took issue not with the majority's articulation of the applicable legal standard, but with its application of that standard to the evidence in the record. In particular, Judge Kozinski concluded that the evidence did not establish, as he understood the majority's standard to require, that petitioners' posters and list conveyed the message that petitioners themselves or persons acting in concert with them would inflict bodily harm on respondents. See Pet. App. 57a. The majority described the evidence as sufficient in that regard. See *id.* at 8a ("the jury must have found that ACLA made statements to intimidate the physicians, reasonably foreseeing that physicians would interpret the statements as a serious expression of ACLA's intent to harm them"); *id.* at 40a ("Physicians could well believe that ACLA would make good on the threat."). Petitioners do not appear to seek review of the court of appeals' decision on the sufficiency grounds stated in Judge Kozinski's dissent. Accordingly, this case provides no occasion to consider whether a threat that an unrelated third party will commit violence against the victim may constitutionally be proscribed.

Other courts of appeals have adopted generally similar formulations.[4]

Contrary to petitioners' contention (Pet. 24), there is no conflict between the Ninth Circuit's standard and that of the Second Circuit that warrants this Court's review. The Second Circuit, like the Ninth Circuit, has adopted an objective test for threats, under which the purpose of the inquiry is to separate statements made in jest or "political hyperbole" from "true threats." *United States* v. *Francis*, 164 F.3d 120, 123 (2d Cir. 1999) (the government need prove only that the circumstances of the communication "were such that an ordinary, reasonable recipient familiar with the context of the communication would interpret it as a true threat of injury"). The Second Circuit has added a gloss that, to be a "true threat," the statement must be sufficiently "unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *Ibid.* (quoting *United States* v. *Kelner*, 534 F.2d 1020, 1027 (2d Cir.), cert. denied, 429 U.S. 1022 (1976)). But there is no reason to conclude that the Second Circuit would

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[4] See, *e.g.*, *United States* v. *Saunders*, 166 F.3d 907, 912-914 (7th Cir. 1999); *United States* v. *Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997); *United States* v. *Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994); *United States* v. *Malik*, 16 F.3d 45, 48 (2d Cir.), cert. denied, 513 U.S. 968 (1994); *United States* v. *Kosma*, 951 F.2d 549, 557 (3d Cir. 1991); *United States* v. *Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990); *United States* v. *Welch*, 745 F.2d 614, 619 (10th Cir. 1984), cert. denied, 470 U.S. 1006 (1985); cf. *United States* v. *Landham*, 251 F.3d 1072, 1080 (6th Cir. 2001). The courts of appeals mainly differ only with regard to whether the statement is considered from the perspective of a reasonable speaker or a reasonable listener. It is only in the unusual case that such a difference in approach might produce a difference in outcome.

reach any different result under that test than did the court of appeals here.[5]

2. Petitioners contend that the court of appeals erred in concluding that a true threat could result from the similarity in "format" between their "wanted-type" posters and earlier posters that preceded the murders of Drs. Gunn, Britton, and Patterson. See Pet. 12-21. They contend that it is "First Amendment nonsense" to suggest that the same "message" would be protected if "conveyed orally in a public speech" but not if conveyed in a "'wanted-style' poster." Pet. 14.

Petitioners' argument rests on the erroneous premise that a change in "format" cannot produce a change in "message." The choice of one format over another for presenting a message can dramatically alter the implication and meaning of words that are common to both formats. The court of appeals concluded that petitioners' choice of the "wanted-style" poster format had that effect. The court found that, by the time that petitioners chose to target the respondent physicians in

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[5] In *New York ex rel. Spitzer* v. *Operation Rescue National*, 273 F.3d 184, 196 (2d Cir. 2001), the court of appeals indicated that certain statements made by abortion protestors to physicians who performed abortions (such as the statement, following the killing of one doctor, that "killing babies is no different than killing doctors") constituted protected expression under the *Kelner* standard. But the court distinguished that case from situations involving a "direct or even veiled threat," *id.* at 197, and it has never found speech to be protected where, as was the case with the posters here, the communications identified specific persons and the communications foreseeably generated intense fear in light of their resemblance to past similar communications naming persons who later were killed. Cf. *Francis*, 164 F.3d at 123 (emphasizing that "context of the communication" is critical); *Kelner*, 534 F.2d at 1026 (affirming conviction for a threat to kill an individual upon his arrival in New York).

"wanted-style" posters (instead of, or in addition to, public speeches), "the poster format itself had acquired currency as a death threat for abortion providers" as a result of the three recent murders. Pet. App. 32a; see *id.* at 40a (concluding that the poster format sent the message to abortion providers that "You're Wanted or You're Guilty; You'll be shot or killed").

There is nothing novel about a court's considering, as part of the context in which a communication was made, whether previous similar communications were followed by violence. It is self-evident that words or symbols that have come to be associated with violence may be particularly effective tools of intimidation. This Court recognized as much in *Virginia* v. *Black*. There, the Court explained that cross burning, "in light of [its] long and pernicious history as a signal of impending violence," is among "those forms of intimidation that are most likely to inspire fear of bodily harm." 123 S. Ct. at 1549-1550. It was for that reason that the Commonwealth was held not to have engaged in impermissible content discrimination by outlawing cross burning with the intent to intimidate without outlawing all other forms of intimidating expression. *Ibid.*

"Wanted-style" posters targeting abortion providers do not have as extensive an association with violence as does cross burning; for example, at the time of the events at issue here, only three abortion providers had been killed after the issuance of posters identifying them, and other abortion providers identified in such posters had not been killed or wounded. (Nonetheless, even at a time when only three cross burnings had been followed by lynchings or other violence, and many other cross burnings had not, the target of a cross burning might reasonably have perceived a threat.) The court of appeals concluded, however, that the association was

sufficiently strong, in the wake of the three recent murders of abortion providers, to cause such posters to be understood as a serious expression of intent to inflict bodily harm. Whether or not there is room for disagreement about that conclusion, this Court does not sit to review the lower courts' application of correctly stated legal standards.

3. Petitioners further contend that the court of appeals erred in declining to incorporate into its true threats standard a requirement that the speaker "*specifically intended*" to make a threat. Pet. 22. Instead, petitioners argue, the court of appeals applied a "negligence standard." *Ibid.*; see Pet. 21-25. As the court of appeals recognized, however, "[o]ther circuits are in accord" with its objective standard, which considers how a statement would be understood by a reasonable speaker (or, in some cases, a reasonable listener). Pet. App. 27a; see note 4, *supra*. Those courts have recognized that an objective standard avoids difficult inquiries into subjective intent, and assures protection against the fear and disruption associated with statements reasonably understood as serious threats, whether or not a threat was intended. See, *e.g.*, *United States* v. *Kosma*, 951 F.2d 549, 556-557 (3d Cir. 1991). This Court recently denied certiorari in a case challenging the objective approach. See *Morales* v. *United States*, 536 U.S. 941 (2002) (No. 01-8544).[6]

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[6] While the Court stated in *Virginia* v. *Black* that "'[t]rue threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," 123 S. Ct. at 1548 (emphasis added), the Court was not asked to (and did not) decide whether the true threats standard is an objective one or a subjective one (or both). Since the Virginia law

The case is not a suitable vehicle in which to consider whether the jury should have been required to find an intent to threaten, since the jury *was* required to find an essentially identical intent to intimidate or interfere with respondents or others. The FACE Act, the statute under which petitioners were found liable, does not prohibit threats *simpliciter*; rather, the Act prohibits "intentionally injur[ing], intimidat[ing], or interfer[ing] with" any person by, *inter alia*, the "threat of force." 18 U.S.C. 248(a)(1). The court of appeals thus understood that the FACE Act itself required that petitioners be found to have made threats with "the intent to intimidate." Pet. App. 27a, 34a. The district court's instructions to the jury were consistent with that understanding. See 1/26/99 Tr. 19 (instructing jury to consider whether each petitioner made "a threat of force to intimidate or interfere with, or attempt to intimidate or interfere with" respondents or other persons) (quoted at Pet. App. 34a). An intent to intimidate—defined by the district court as "to place a person in reasonable apprehension of bodily harm," 1/26/99 Tr. 19—is virtually identical to an intent to threaten. An intent to interfere—defined as "to restrict[] a person's freedom of movement," *ibid.*—is also analogous to an intent to threaten where, as here, the *actus reus* is making a "threat of force."

4. Petitioners argue (Pet. 16, 24-25) that the court of appeals' true threats standard is inconsistent with *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam), which held that advocacy of violence may be proscribed only if it "is directed to inciting or producing imminent lawless action and is likely to incite or

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at issue required an intent to intimidate, the question was not squarely presented. The same is true here.

produce such action." *Brandenburg* was not, however, a threats case. This Court has never suggested that true threats should be subject to *Brandenburg*'s imminence requirement; to the contrary, the Court has characterized true threats and incitement as separate categories of proscribable expression. See *Black*, 123 S. Ct. at 1547-1548.

Moreover, because the harms that justify the prohibition of incitement and true threats are different in nature, there is no reason to import an imminence requirement into the true threats analysis. Incitement may be proscribed in order to prevent violence that would erupt before passions have had time to cool. See *Brandenburg*, 395 U.S. at 448. In contrast, true threats may be proscribed in order to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388. As Judge Berzon explained (Pet. App. 82a), those harms may be intensified and prolonged when the speaker refuses to specify when the threatened violence can be expected.

5. Nor are petitioners correct in claiming (Pet. 16-20) that the court of appeals' decision conflicts with *Claiborne Hardware*. As the court explained, while some of the statements in that case (including one that made reference to breaking necks) could have been understood as threats in some contexts, "there was no context to give" the statements "the implication of authorizing or directly threatening unlawful conduct." Pet. App. 25a. The court noted that the statements were "extemporaneous," were "surrounded by statements supporting non-violent action," did not single out specific individuals, were not similar to statements that preceded violence in the past, and were not understood by boycott violators as a serious threat of bodily harm.

Ibid. All of those considerations distinguish *Claiborne Hardware* from this case.

6. Petitioners argue (Pet. 15) that the court of appeals erred in adopting a true threats standard that does not consider whether a statement was made publicly or privately. To the contrary, the court's standard, which considers whether one would reasonably expect a statement to be understood "in the entire context" as a "serious expression of intent to inflict bodily harm," adequately accounts for distinctions between public and private speech. Pet. App. 28a. As the court recognized, "a privately communicated threat is generally more likely to be taken seriously than a diffuse public one," *id.* at 41a, and thus is generally more likely to satisfy that standard.

There is no need to alter the legal standard itself, however, to accord greater protection to "specifically targeted" threats, Pet. App. 41a, simply because they have been clothed in political rhetoric and displayed to the world at large. Indeed, such threats may inspire particularly intense fear among their victims, given the enhanced "possibility that the threatened violence will occur," *R.A.V.*, 505 U.S. at 388, if not at the speaker's hands, then at the hands of one who heard the threat.

7. None of petitioners' other challenges to the court of appeals' decision warrants review.

Petitioners claim (Pet. 25-26) that the court of appeals affirmed their FACE Act liability on a "theory" different from the one presented to the jury. The court of appeals, however, applied the same true threats standard that the jury was instructed to apply and considered the same posters and list that the jury was instructed to consider. Compare Pet. App. 28a with 1/26/99 Tr. 14-18. In any event, the claim, whether or

not meritorious, is wholly without significance outside this case.

Petitioners also contend (Pet. 26-30) that the court of appeals did not engage in "independent review" of the evidence bearing on whether their posters and list were true threats. The court of appeals explicitly stated, however, that "we review the evidence on true threats independently." Pet. App. 39a; see *id.* at 20a. The dissenting judges agreed that the majority stated the correct standard of appellate review. *Id.* at 54a.

Finally, petitioners argue (Pet. 30), in cursory fashion, that the district court's injunction is an impermissible restraint on protected speech. Petitioners' failure to articulate the precise basis for their argument is itself a sufficient reason to decline review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,
Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

Pursuant to Rule 15.8 of the Rules of this Court, Respondents respectfully submit this Supplemental Brief in response to the Brief of the United States as Amicus Curiae ("U.S. Br."), which was filed on May 30, 2003, and Petitioners' Response to Brief of the United States as Amicus Curiae ("Pet. Supp. Br."), which was filed on June 5, 2003.

ARGUMENT

Petitioners' Supplemental Brief Further Demonstrates That There Is No Issue for Supreme Court Review

As we noted in our Brief in Opposition – and as the government[1] agrees – ACLA's petition for a writ of certiorari does not raise any issues meriting this Court's review. As the government states, the Court of Appeals "applied a legal standard for distinguishing 'true threats' from protected speech that is correct and consistent with this Court's decisions." (U.S. Br. 2) ACLA's supplemental brief – by focusing once again on its disagreement with the view of the facts taken by the jury, the District Court Judge, and the Court of Appeals *en banc* majority – only further demonstrates why certiorari review is not warranted here. As the government correctly points out, "[w]hether or not there is room for disagreement about [the Court of Appeals's] conclusion, this Court does not sit to review the lower courts' application of correctly stated legal standards." (U.S. Br. 16; *see* sources cited in Opp. 8, 27)

This Court's recent decision in *Virginia* v. *Black*, 123 S. Ct. 1536 (2003), further supports the denial of the petition in this case.

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[1] Despite ACLA's contention to the contrary, the government articulates an obvious interest in this case – it advances the same "true threats" standard enunciated and applied by the Court of Appeals "in its prosecutions under various threats statutes." (U.S. Br. 11-12; *see id.* at 9)

As in *Black*, the Court of Appeals held in this case that use of symbols to intimidate by threat of bodily injury is not constitutionally protected speech. *See id.* at 1548 ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."); *accord* Pet. App. 41a ("Violence is not a protected value. Nor is a *true threat* of violence *with intent to intimidate*.") (emphasis in original)); *see also id.* ("Physicians' fear did not simply happen; ACLA intended to intimidate them from doing what they do.").

In their supplemental brief, petitioners mistakenly argue that *Black* supports their position that the Court should grant review to impose a subjective intent requirement as a matter of First Amendment law. As the government notes, there is no conflict of authority on the objective "true threats" standard[2] and, in any event, this case, like *Black*, involves a finding of subjective intent under the statute at issue. Specifically, under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, instructions given to the jury in this case, the jury was required to – and did – find that petitioners intended to intimidate respondents (with intimidation specifically defined to mean by threats of bodily injury). (Pet. App. 27a, 34a, 254a; Opp. 16-17; U.S. Br. 16-17)[3] As the government notes, the jury (and the District Judge) found subjective intent and, thus, there is no basis for certiorari review of an issue that would not affect the outcome of this case. (*See* U.S. Br. 10 ("The court of appeals' refusal to incorporate into its true threats standard a requirement that the speaker intended to make a threat could not have affected the outcome of this case. The FACE Act, the statute under which petitioners were held liable for their threats, requires that the defendant act with the intent to injure, intimidate, or interfere with a

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[2] Likewise, as discussed in both our Brief in Opposition and the government's brief, *United States* v. *Kelner*, 534 F.2d 1020 (2d Cir. 1976), does not represent a conflict of authority with the threats standard applied by the Court of Appeals in this case. (Opp. 18-20; U.S. Br. 13)

[3] In their supplement brief, petitioners obfuscate the issue by failing to address the FACE elements instruction, and instead discuss only the "true threats" instruction.

person, and the jury was instructed in accordance with that requirement."))[4]

Petitioners also persist in their "format" argument, again without articulating a cognizable legal theory. As the government notes, the Court of Appeals did not adopt a "'novel notion of actionable threats' . . . To the contrary, the court adhered to the settled practice, reflected in this Court's decisions, of considering the entire context in which a communication is made in order to determine whether it is a true threat." (U.S. Br. 9; *see also id.* at 14 ("Petitioners' argument rests on the erroneous premise that the change in 'format' cannot produce a change in 'message.'"); *id.* at 14-15

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[4] ACLA's argument that the Court should adopt a subjective intent requirement for true threats also was not properly preserved below. In their initial jury instructions, petitioners supposedly "preserved for appeal" a specific intent argument by including a specific intent jury charge in a mass of proposed jury instructions that contained contradictory instructions on the standard of intent. But, petitioners *never* argued that the trial court should give the instruction. Indeed, at the final charge conference with the District Judge, ACLA's lead counsel stated with respect to the "true threats" instruction: "Yes, I never said -- I never said the test should be changed. . . . I am not arguing, your Honor, that the test should be changed." (1/25/99 Tr. 3123) Simply submitting a proposed instruction stating it is "preserved for appeal" is insufficient under well-settled rules of preservation. Fed. R. Civ. P. 51; *see, e.g.*, *Monroe* v. *City of Phoenix*, 248 F.3d 851, 858-59 (9th Cir. 2001). Moreover, to the extent that ACLA makes in its supplemental brief any statutory arguments under FACE, it should be noted that ACLA did not object before the trial court to the FACE elements instruction, including the element of intention to intimidate. (1/25/99 Tr. 3098, 3102) ACLA's failure to preserve its arguments for review is yet one more, independent reason for the Court to deny certiorari in this case. *See Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below."); *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) ("We ordinarily will not decide questions not raised or litigated in the lower courts. That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction . . . ." (citation omitted)); *Sisson* v. *Ruby*, 497 U.S. 358, 359 n.1 (1990) ("We decline to consider that argument because it was not raised below.").

("There is nothing novel about a court's considering, as part of the context in which a communication was made, whether previous similar communications were followed by violence. It is self-evident that words or symbols that have come to be associated with violence may be particularly effective tools of intimidation. The Court recognized as much in *Virginia* v. *Black*.")

Further, despite ACLA's contention that the communications at issue "fall into the category of incitement, not threats" (Pet. Supp. Br. 6; *see* Pet. 16), there is no issue to be reviewed here either. Significantly, ACLA requested, and received, an instruction that explained the difference between threats and incitement theories, and emphasized that this was a threats, not an incitement case. (11/12/98 Tr. 27-28; 1/11/99 Tr. 767-68; Resp. App. 73a-74a; Opp. 22-23; *see also* U.S. Br. 17-18)

Finally, to the extent petitioners attempt to raise for the first time in their supplemental brief an argument that, under the First Amendment, an individual may only be held liable for threats if it is clear that he or his agent will personally carry out the threatened harm, that argument has not been properly presented for this Court's review. First, it is not one of the Questions Presented in the petition.[5] Moreover, the jury – and the Court of Appeals, upon conducting an independent review of the record – found that petitioners would be the source of the threatened harm. (Resp. App. 75a; *see e.g.*, Pet. App. 40a ("Physicians could well believe that ACLA would make good on the threat.")) Thus, as noted in the government's brief, "this case provides no occasion to consider" any such argument. (U.S. Br. 12 n.3; *see* Opp. 27 n.33)

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[5] ACLA also failed to include statutory FACE arguments among the Questions Presented in the petition. *See* S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184, 202-03 (2002) (holding that a question not presented in the petition was "not properly before" the Court).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: June 12, 2003

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In the

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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ARGUMENT

The Solicitor General's amicus brief articulates no governmental interest in this case; it is largely an amicus brief for respondents, replicating their arguments, selective approach to the record,[1]/ and failure to dispute key point s.

Undisputed Points

The government's brief does not dispute any of the points that have brought this case to national attention and made it worthy of certiorari, including these:

- The Ninth Circuit's affirmance of the $120 million verdict and the injunction rests on nothing but a bare en banc majority's theory that *otherwise protected* political posters are "threats" solely because of their "Wanted-style" *format*. Pet. 7-9.

- The "Wanted-style format" was deemed threatening only because of a supposed "poster pattern" consisting of a grand total of two coincidental acts of anti-abortion violence committed by *non-parties* against doctors named in "similar" posters published earlier by still other *non-parties*.[2]/ Pet. 7-9, 12-13.

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[1]/ For example, the government claims petitioners "knew" their posters created "fear" because one petitioner, Charles Wysong, testified that of the "two things" defendants fear most, one is "having their picture put on a poster." SG 4. Like respondents, the government fails to mention the rest of Wysong's statement, which explains *why* doctors fear this: "They don't want to be *publicly known*." Tr. 1610. Indeed, the "Deadly Dozen" poster contains no pictures. L. 3. It is telling that in a case where "context" is supposedly crucial, both the government and respondents resort to out-of-context quotations. This is why the dissenters in the Ninth Circuit noted that there is no evidence petitioners threatened anyone with bodily harm. Pet. 54a-56a.

[2]/ Respondents conceded that there is *no evidence* that a third act of violence against an abortion doctor named in a poster, Dr. Patterson, who was killed in an apparent robbery attempt, had anything to do with anti-abortion activity. Pet. 8, 55a.

- Hundreds of other posters of abortion doctors, including petitioners' two posters, have been followed by no violence whatsoever. Pet. 8.

- In the entire history of the use of posters condemning abortion doctors, exactly one person involved in poster-making—Paul Hill—is known to have committed violence against an abortion doctor. Pet. 55a.

- The Ninth Circuit's "format" theory was never given to the jury or followed by the trial judge, who both punished the posters without limitation to "format."[3]/

Further, the government does not dispute that political speakers have no way of knowing what "Wanted-style format" means. Petitioners' posters do not even contain the word "Wanted," and the en banc majority declared that "differences in caption or words are immaterial." Pet. 39a. *The verdict and the injunction thus hinge entirely on a forbidden "format" that has never been defined.* The government does not dispute that the Ninth Circuit's vague, *ad hoc* ruling has effectively criminalized *all existing and future posters* condemning named abortion doctors. Pet. 20-21. What anti-abortion activist would now gamble on passing the "Wanted-style format" test?

Finally, the government does not dispute that the Ninth Circuit has also punished *five other forms of political expression* tenuously linked to the posters:

- A list of doctors' names on a website, deemed a threat *only* when read "in conjunction" with the "wanted-style format" of posters naming the same doctors. Pet. 9; L. 19-21.[4]/

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[3]/ The government argues that this well-founded claim of error, "whether or not meritorious, is wholly without significance outside this case." SG 19. In other words, the government urges this Court to overlook a fundamental deprivation of due process in a case with national First Amendment implications.

[4]/ The government does not dispute that the doctors' list was created by non-party Neal Horsley, *after* petitioners' organization was removed from his site. Pet. 3-4.

- An editorial in *Life Advocate* magazine, defending ACLA's "Deadly Dozen" poster (but not reproducing the actual poster "format"), presented to the jury as a "republication" of the "threat." Pet. 9; L. 11-12.

- A *Salt and Light* newsletter article providing a thumbnail reproduction of the poster and explaining that it was not a "hit list" as the political opposition had claimed. This was likewise presented to the jury as a "republication" of the "threat." Pet. 9; L. 7-9.

- Any undefined "equivalent" of ACLA's posters, republished "threats" in the magazine articles, or the verboten website content. Pet. 44a, 182a-183a.

- The publication in print or electronic form of *any* "personally identifying information" concerning plaintiffs, *whether or not it appears in a "wanted-style format poster."* Pet. 44a, 183a.

These undisputed points demonstrate an unheard-of invasion of First Amendment liberty that has provoked law review commentaries, years of national press coverage, and a call for the Solicitor's General's opinion. It is astonishing that the government claims this case presents no question of national importance. SG 10.

The Government's Discussion of Virginia v. Black

In *Virginia v. Black*, 123 S. Ct. 1536 (2003), this Court held cross burning can be proscribed by a criminal statute that requires *specific intent* and proof of guilt *beyond a reasonable doubt*. This Court so held *only* because "[b]urning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan," 123 S. Ct. at 1544, and with *the Klan's* innumerable acts of murder, arson, and mutilation after the burning of crosses *by Klan members*. *Id.* at 1544-47. Based entirely on an "inextricably intertwined" and "indelible" association between cross burning and violence by "the *person who burns the cross*," this Court found that a burning cross can constitute a "true threat," even if today the cross burner might not be a member of the Klan. *Id.* at 1544-46 (emphasis added, here and throughout).

In discussing *Black*, the government contends three acts of *unrelated* violence created a "sufficiently strong" association between posters and violence to make "wanted-style posters" a per se threat. SG 14-15. The analogy to *Black* is untenable, for it is undisputed that in the entire history of the pro-life movement *one* person involved in making posters condemning abortion doctors—Paul Hill—later committed violence against an abortion doctor. Pet. 55a. With the exception of Hill, there is *no* history of violence against abortion doctors *by the makers of posters*, much less an "indelible" and "intextricably intertwined" history. On the contrary, poster-makers—including the petitioners—have *refrained* from violence.

Moreover, unlike cross burning, "Wanted-style poster" eludes definition. The concept is no more constitutionally supportable as a basis for restricting speech than would be a Virginia statute banning "cross burning-style" activity.

Finally, unlike cross burning, whose communicative content is minimal, "the posters and website are all public presentations on a matter of current moral and political importance; they provide information to the public... and propose a—peaceful, legal—course of action..." Pet. 75a (Berzon, dissenting). Punishment of such speech is unprecedented.

The Ninth Circuit's decision is thus clearly in conflict with *Black*. What the government is really arguing—contrary to *Black*—is that any form of political expression can be converted into a "threat" if its use is followed only two or three times by violence, *even if there is no history of violence by those who have employed that form of expression.*

The government, citing only *Black*, claims there is "nothing novel about a court's considering, as part of the context in which a communication was made, whether previous *similar communications* were followed by violence." SG 14. But the result in *Black* depends precisely upon a close—indeed, a unique—connection between a *specific, clearly definable form* of expressive conduct and a century of *imminent* violence *by those who used that precise form of expression.*

Ranging far beyond *Black*, the government suggests that a speaker must now make sure, not only that his or her mode of expression was never followed by violence, but also that "*similar communications*" in the past were not followed by violence, even *unrelated* violence, only two or three times. What does "similar

communications" mean? How is any political speaker to avoid liability under this standard? *Black* lends no support to this bizarre theory, nor does any other reported case in United States history, except this one. The government endorses precisely the novel threat to First Amendment liberty remarked by the five dissenters: "In this case, defendants *said nothing remotely threatening*, yet they find themselves crucified financially. Who knows what other neutral statements a jury might imbue with a menacing meaning based on the activities of unrelated parties." Pet. 68a-69a.

Blurring the Distinction Between "Intimidation," "Incitement" and "Threat"

Black holds that only *threats of force* constitute "[i]ntimidation in the constitutionally proscribable sense." 123 S. Ct. at 1548. Unlike the Ninth Circuit, *Black* defines "true threats" as "those statements where the speaker *means* to communicate a serious expression of an *intent to commit* an act of unlawful violence to a particular individual or group of individuals." *Id.* That is, this Court has now, for the first time, made it clear that a true threat requires (1) a *statement*, (2) by which the speaker *means*, (3) to communicate the *speaker's* intention, (4) to *commit* violence.

Otherwise, intimidating political speech is *not* proscribable, as this Court made clear in its unanimous decision in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982). *Claiborne* holds that even political rhetoric that "might have been understood as... *intending to create a fear of violence*" is protected, since "[s]peech does not lose its protected character...simply because it may embarrass others or *coerce* them into action." *Id.* at 910, 927.

Throughout its brief, however, the government wrongly equates "intimidate" with "threaten." SG 6, 7, 9, 11 n.3, 16. But the Freedom of Access to Clinic Entrances Act (FACE) itself only prohibits intimidation, defined as "apprehension of bodily harm," 18 U.S.C. § 248(e)(3), when intimidation is *caused by a threat of force*, and *not* otherwise. 18 U.S.C. § 248(a)(1). Like the en banc majority, the government ignores this distinction, arguing that "intimidating"—placing a person in apprehension of bodily harm —is "essentially identical" to threatening a person. SG 16.

The Circuit conflict on this point is shown in *Spitzer v. Operation Rescue*, 273 F.3d 184, 196 (2d Cir. 2001), a FACE case in which the Second Circuit recognized that

> a court must be sure that the recipient is fearful of the execution of the threat *by the speaker* (or the speaker's co-conspirators). Thus, generally, a person who informs someone that he or she is in danger from a third party has not made a threat, *even if the statement produces fear*.... The evidence adduced at the hearing contains many such statements that do not constitute threats *even though they may have increased the recipient's apprehension of harm*. Yet the District Court did not pay due attention to this difference.

The government's attempt to distinguish *Spitzer* on its facts, SG 13 n. 5, is mere obfuscation. The Ninth Circuit has done precisely what the Second Circuit rejected: equating a statement inducing apprehension of harm with a threat under FACE.

As the Second Circuit recognized, to ignore FACE's requirement that "intimidation" be *caused by* a "threat of force" is to allow the statute to devolve into a ban on disturbing speech or non-imminent incitement, rendering any statement that makes someone apprehensive of harm—from any source, at any time in the future—a "threat." In fact, the government explicitly claims that the posters are "threats" because they engender fear of harm "if *not at the speaker's hands* then at the hands of one who heard the threat." SG 18. But communications that arouse fear of violence committed by those who "heard" the communications fall into the category of incitement, not threats.

The government's discussion of *Black* practically concedes the posters do not meet the *Black* test for a "true threat," but are, at worst, a form of non-imminent incitement:

> Neither the posters nor the Nuremberg Files contained any explicitly threatening language. The physicians who were the subjects of the posters and the Nuremberg Files nonetheless feared for their safety, because the personal information and photographs[5/] *made them easily identifiable* and because three other physicians had been killed after they were *identified* in

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5/ This is one of several factual misstatements in the government's brief. The only respondent whose photograph appears in any of the communications is Dr. Crist, who is depicted in the poster condemning his activities. L. 5.

> *similar* posters.... [P]etitioners 'deliberately *identified*' the respondent physicians 'to intimidate them.'" SG 3-4, 7.

The focus on "identification" as the "threat" demonstrates this is a poorly disguised incitement case. Petitioners would hardly need to "identify" people *whose identity they already knew* in order for *petitioners* to threaten bodily harm. The government, like the Ninth Circuit, confuses incitement with threats, and threats with intimidation, thus radically breaking with the concept of a threat as a statement "where *the speaker* means to communicate...an *intent to commit* an act of unlawful violence..." *Black*, 123 S. Ct. at 1548. That is precisely the legal error identified by the five dissenters, Pet. 56a-58a, and the three-judge panel that reversed the verdict. Pet. 119a-125a.

The Issue of Specific Intent is Squarely Presented

The government does appear to acknowledge that the *Black* test requires a statement by which the speaker "*means* to communicate" an intention to commit violence—that is, specific intent to make a threat, SG 15 n. 6, but claims the question is not squarely presented here because the jury charge on FACE required the jury to find "an essentially identical intent to intimidate . . ." SG 16.

First of all, the government ignores the record. The jury was admonished that "Defendants' subjective intent or motive is *not the standard* that you must apply in this case" and that the jury need not "find that any of the defendants actually intended to threaten plaintiffs, so long as you find that a reasonable person would have foreseen that it would be understood to be threatening." Pet. 251a-252a. The district court even went so far as to instruct that "you must" find petitioners liable "*even if you believe that the defendants did not intend the statements to be threatening,*" so long as it was "foreseeable" that the posters would be "interpreted" as threats. Pet. 5, 251a Furthermore, the jury instruction deletes "intentionally" from FACE's language, as quoted by the government. SG 5; Pet. 253a-254a. The result was a pure negligence standard for defining "threats" in political posters.

Since the district judge instructed the jury that *subjective intent is not the standard* for threats in violation of FACE, it necessarily followed that "intimidation" need not be subjectively intended;

for the only kind of intimidation FACE prohibits is intimidation *by* a threat of force (absent actual force or physical obstruction), and the district court insisted that such a threat could—indeed *must* — be found *"even if you believe the defendants did not intend the statements to be threatening."* Pet. 251a. The government's pure speculation that the jury might have found specific intent despite this grossly defective instruction hardly avoids the issue. The dissenters recognized that this case *does* present the question whether specific intent was required by this Court's precedents—now including *Black*. Pet. 74a-87a.

At any rate, as discussed above, an intent to intimidate is *not* "essentially identical" to an intent to threaten bodily harm. If the government believes that "intimidation = threat," then this Court's review is all the more necessary, because that reading of FACE would make it unconstitutional under *Claiborne* and *Black*.

The En Banc Majority Failed to Follow Any Recognized Threat Standard

The dissenters did not disagree with the majority merely over whether its "correctly" stated "objective" threat standard was satisfied by the evidence. SG 9.[6]/ Rather, the dissenters objected that the majority *"utterly fails to apply its own definition...."* Pet. 53a. The majority never demonstrated the existence of a *"statement* which...would be interpreted...as a serious expression of intent to *inflict* bodily harm...." Pet. 28a; 53a. The majority abandoned this definition and found petitioners liable for posters "generating fear" over an illusory "pattern" based on past violence defendants had nothing to do with. No recognized threat standard supports this novelty.

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[6]/ The government vainly characterizes Judge Kozinski's entire dissent as a mere dispute over sufficiency of evidence. SG 11 n. 3. On the contrary, the dissenting opinion objects that the majority has impermissibly expanded legal liability for "threats" to statements that induce apprehension of violence by unrelated third parties, *contrary to this Court's precedents*. Pet. 56a-58a, 69a. This case presents pure questions of First Amendment law, arising from undisputed facts, not a debate over the *quantum* of proof.

Failure to Explain Away Other Conflicts

The government contends there is no conflict between the en banc decision and *Claiborne*, because in *Claiborne* there was no "context" to give Evers's statements a threatening meaning. SG 17. As the dissenters noted, however, there *was* a "context" of violence surrounding Evers's statements; but it did not matter anyway, because Evers's explicit references to violence required no "context" to be understood. Pet. 63a-64a. This Court itself noted that the statements "might have been understood as...*intending to create a fear of violence*...." 458 U.S. at 927. But it is precisely "creating a fear of violence" that the Ninth Circuit has equated with a threat. The government's "distinction" between this case and *Claiborne* is non-existent.

The government claims the imminence requirement of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), does not apply because this is a "threat case." SG 16-17. The government begs the question. Petitioners were held liable because the "poster pattern" "generated fear" of violence that never happened. It did not matter to the majority *who* might do violence or *when* it would occur. Pet. 16. This is nothing but an attenuated incitement claim that the label "threats" cannot hide. Pet. Reply 5-6. The dissenters note the conflict with *Brandenburg*.[Z]/ Pet. 57a-61a, 69a.

The government inexplicably maintains that the en banc majority followed this Court's precedents on the heightened protection for public political speech, even though the majority *explicitly refused to accord such protection* in a "threat" case. SG 18; Pet.28a. The dissenters note the majority's abandonment of this Court's public/private distinction in speech cases. Pet. 52a-53a, 65a-68a, 72a-73a.

The government sees no conflict with *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976), and claims "there is no reason to conclude the Second Circuit would reach any different result under that test...." SG 12-13. This speculation defies common sense. In the Ninth Circuit, protesters can be punished under

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[Z]/ The Solicitor General does not even mention the conflict with *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002), in which this Court found that "The Government has shown no more than a remote connection" between computerized images and sex crimes against children. *Id.* at 1403; Pet. 20; Pet. Reply. 7. Here, the government again endorses an unconstitutional theory of "pattern" liability for speech.

FACE for *any statement*, no matter how innocuous, if a "reasonable person" would foresee that the statement would be interpreted as a threat, Pet. 25a-28a, whereas in the Second Circuit protesters can be punished only for a statement that is "unequivocal, unconditional, immediate, and specific" and conveys a "gravity of purpose and imminent prospect of execution." *Kelner*, 534 F.2d at 1027. Judge Berzon recognized the Circuit conflict. Pet. 79a-87a.

An undefined poster "format" that "generates fear" over a "pattern" could not possibly meet the *Kelner* test. And in *Spitzer*, 273 F. 3d at 196-97, the Second Circuit, heightening the Circuit conflict, affirmed that *Kelner* applies to threat claims under FACE:

> Given the context, it is understandable that the clinic doctor feared for her safety... But excessive reliance on the reaction of recipients would endanger First Amendment values... [Defendant's] statement did not indicate the *"unequivocal immediacy* and *express intention," Kelner*, 534 F.2d at 1027, of a true threat....

CONCLUSION

This Court should grant the writ of certiorari.

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